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In The

Supreme Court Of The United States

Tonia E. Fisher

vs.

Southwestern Bell Telephone Company

Petition for a Writ of Certiorari to

The United States

Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Tonia E. Fisher
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734-233-7046

QUESTIONS PRESENTED

1. Whether under the plain language and ordinary meaning of the 1991 amendments to Title VII, and after this Court's holding in Desert Palace, the appropriate legal standard for analyzing claims brought under Title VII at the summary judgment stage is the mixed motive analysis.

2. Whether claims brought pursuant to the ADA, (Americans with Disabilities Act), are correctly analyzed at the summary judgment stage with a mixed motive analysis.

PARTIES

The parties are as identified in the caption of this petition: Tonia E. Fisher, petitioner, Southwestern Bell Telephone Company, respondent.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Tonia E. Fisher, respectfully petitions this Court for a writ of certiorari to review the Jan. 25, 2010 Judgment and Order of the Tenth Circuit Court of Appeals.

OPINIONS BELOW

The Order and Judgment of the Tenth Circuit Court of Appeals, entered on Jan. 25, 2010 , is set out at pp. 1a-13a of the Appendix. The Order of the Tenth Circuit, entered on Mar. 12, 2010, denying rehearing en banc is set out at pp. 14a-15a of the Appendix. The District Court Opinion and Order

granting summary judgment, entered on Apr. 6, 2009, is set out at pp. 16a-63a of the Appendix. The Order of the District Court denying the FRCP 59e motion to Alter/Amend the Judgment, entered on Jun. 1, 2009, is set out on pp. 64a-78a of the Appendix.

STATEMENT OF JURISDICTION

This Court's Jurisdiction is proper under 28USC § 1254(1). The decision of the Court of Appeals was entered On Jan. 25, 2010 (unpublished). A timely petition for rehearing en banc was denied on Mar.12, 2010(unpublished). On Jun.9, 2010 this Court granted an extension of time in which to file the petition for certiorari until Aug. 9, 2010.

STATUTES INVOLVED*

42USC2000e-2(a)(1)

42USC2000e-2(m)

42USC2000e-3(a)

42USC12112(a)

42USC12102(i)(ii)(iii)

42USC12101(a)(1-9)

42USC12101(b)(1-4)

42USC12203(a)

*The pertinent text is set out in the Appendix.

STATEMENT OF THE CASE

The facts of petitioner's case present a picture, a real world example of the way in which a large, savvy employer finds innovative ways in which to mask the motivations that result in unlawful employment practices. This case reveals many of the prohibited motivations, related to protected characteristics, that generate negative employment practices in violations of federal law.

Fisher began work for Southwestern Bell in 1997 under the title of systems technician. She was assigned to the Construction/Engineering division. Fisher was one of very few females within the state of Oklahoma who worked in ' outside plant'[1]. Fisher satisfactorily performed her job duties while in the Construction division. Fisher worked hard to learn and earn the technical aspects of the telecom industry and was accepted as a team member by her co-workers. Fisher was recognized from the outset

[1] 'outside plant' is a term the respondent uses to refer to it's outside facilities.

as being safety conscientious[2]. After two years in the construction division, Fisher transferred to the Installation/Repair division; she was the only female on the crew. The discrimination Fisher endured was not from her male co-workers, rather, from within the very ranks of management for the respondent

In December 2002 Fisher informed her supervisor that she had received an off the job charge of DWI. Fisher was immediately suspended without pay 'pending an investigation' and required to submit a detailed account of the circumstances in writing. Fisher submitted a written statement describing the events surrounding the charge. It was explained that, at the time, she was parked on the shoulder of the road with her flashers on because she was using her cell phone and trying to be safe. An officer noticed her vehicle with the flashers on and radioed that he was initiating contact with a motorist in distress. As the officer approached Fisher's vehicle he noticed an open container, she was charged with DWI and given a court date.[3]

Fisher continually contacted her area manager while on the unpaid suspension requesting to return to work. The union initiated grievance proceedings on her behalf. She was a single parent with her sole

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[2] Fisher's very first performance evaluation stated "makes good safety sense".

[3] The DWI charge was later dismissed and expunged from her record. Fisher's driver's license was never revoked nor suspended. At all times Fisher maintained a valid driver's license.

source of income being her employment. During the four month unpaid suspension Fisher was contacted by a senior male technician and informed that the respondent's male president for the state of Oklahoma had similarly received a DWI charge and simultaneously received a charge of carrying a loaded firearm. Rather than being suspended, he was subsequently promoted. Fisher contacted respondents internal EEO office to lodge a complaint, not realizing this would trigger the beginning of the end of her career. For four months the respondent refused to allow Fisher to return to work.

A meeting between Fisher, union representatives, and management officials was held in early spring. It was at that meeting the union specifically alleged gender discrimination[4]. In April 2003, in what has been termed a 'grievance resolve', Fisher was allowed to return to work contingent upon certain conditions: she was required to drop her then pending claim for unemployment benefits, submit to an evaluation by a company selected medical provider, and submit to random drug and alcohol testing. Under duress, Fisher agreed to these conditions so that she could return to work and earn a paycheck.

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[4] This information is included in Fisher's affidavit submitted in opposition to summary judgment.

Immediately upon her return to work, Fisher was presented with her first negative employment evaluation of her career. The evaluation listed two separate areas as unsatisfactory; safety and attendance[5]. Prior to the unpaid suspension of Fisher by the respondent, Fisher had never missed a days work in over five and a half years. Likewise, she had never had an on the job safety deviation. Fisher immediately protested and stated "this will never fly".[6] From the point of her return in April 2003 and ending only with her termination in November of 2006, Fisher was scrutinized and targeted for termination. Thirteen separate times Fisher was randomly tested for drugs and alcohol within a two year period. Fisher did not have a drug or alcohol issue and all results were indicative of this. The testing was merely one of the methods respondent utilized to single Fisher out. Her criteria for meeting expectations changed on her performance evaluations,[7] she was scrutinized continually, and from the internal EEO report forward Fisher never again received a satisfactory

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[5] After Fisher's termination, the union provided her with a copy of her file which included a copy of an agreement to expunge the 'unfair and unjust' employment evaluation from Fisher's personnel file in exchange for Fisher waiving all claims, grievances. lawsuits, arising from such. The respondent never produced this document during the discovery process, however, did produce her personnel file which still contained the 'unfair and unjust' evaluation.

[6] The union initiated further grievance proceedings on Fisher's behalf.

[7] The number of completed jobs within a given amount of time was one of the areas that increased.

performance evaluation. Prior to her EEO report, the last performance evaluation Fisher received listed her as "exceeding expectations".

By August 2005 Fisher's health had deteriorated to the point that it was necessary for her to take time off. With the appropriate medical documentation Fisher went on short term medical disability. Not long thereafter Fisher contacted her area manager with concerns for her job requesting to return to work. She stated she feared the company was going to "try and find a way to get rid of me". She inquired if there were another job she could perform; Fisher had lost a substantial amount of weight and muscle mass. She was told she could not transfer while on a disability leave and to just go and 'get healthy'. Fisher was later informed that she may have to be 'retested' upon her return to work.

Fisher requested if the retesting would relate to pole climbing (pole climbing is known to present potential if not probable serious injury and was not necessary to the performance of her job....pole climbing class also traditionally did not have a high pass rate-especially for females) and stated that she was qualified for her job. In a subsequent phone call her area manager confirmed that she was indeed qualified for her job.

In February 2006 Fisher's physician released her to return to work with the physical restriction of no lifting for one month. Respondent categorically

denied this request without engaging in any type of interactive process other than to just say 'no'[8]. Respondent's refusal to allow Fisher's return to work, combined with Fisher's treatment by respondent after her EEO report only exacerbated the stress and Fisher's health continued a decline. For nearly six additional months respondent would not allow Fisher's return to work.

In mid summer Fisher initiated a conference call with her area manager and a human resources representative (this was the same hr rep. that was involved in the Spring '06 meeting in which gender discrimination was alleged.) Fisher was seeking an unpaid leave of absence[9] since the respondent had continually refused an accommodation for her to return to work.[10] Fisher was informed she could not take a leave of absence while on the disability leave. Fisher's short term disability case manager had previously informed her this was an option according to both her and her supervisor's understanding and that "it's common"[11] Fisher stated during this phone call that she had been attempting to return to

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[8] Documentation evidencing this was submitted as an exhibit to plaintiff's opposition to summary judgment.

[9] The short term disability leave was a paid leave, however, was only fifty percent of what Fisher could have earned if respondent had allowed her to return to work with an accommodation.

[10] After one year of short term disability leave there is no job guarantee.

[11] Transcript of phone call with disability worker was included in plaintiff's exhibits in opposition to summary judgment. Case worker for the disability leave is an agent for the respondent.

work for some time and that if it was necessary she would get an attorney. Respondent informed Fisher that the only way she could return to work was if the restrictions were no longer than 30-60 days[12]

Finally in mid August respondent allowed Fisher to return to work pursuant to it's official 'Transitional Work Program'. The goal of the policy is for employees to return to work without restrictions within sixty days. With appropriate medical documentation the sixty days may be extended according to the policy[13]. The policy also states that "if an employee does not reach the goal of the program, restrictions may be viewed as permanent".

Fisher's job duties in the Transitional Work program consisted of making follow up phone calls on customer satisfaction relating to technician's service calls. Fisher was allowed into the field environment for part of one day to do inspections for her supervisor. The release by Fisher's physician stated the physical restrictions could be lifted beginning on Monday, Oct. 23, 2006. On the 19th of

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[12] Fisher relayed this information to her treatment provider along with her concerns that she would lose her job if she did not submit a release stating the 30-60 days. Fisher's treatment provider submitted a release to 'her regular job duties' within the 60 days as respondent had required.

[13] Prior to being allowed to return to her job, the 'Transitional Work Program' was never discussed with Fisher, likewise after returning to work respondent never explained the policy.....it was understood that the 60-90 days was absolute.

October Fisher's supervisor met with her and stated the next day she would be riding with another technician (presumably to get her acclimated back to the field environment) and that Monday she would return to the field on her own. It was communicated that Fisher would be required to demonstrate carrying a ladder, and later, in about a week would need to demonstrate pole climbing.[14]Fisher informed her supervisor that she would need some hooks[15] as hers had been gone for at least a couple of years.

For the prior nine years of her employment whenever Fisher performed aerial work, about ten percent of the time, she utilized an alternate method -an aerial ladder- (as did the majority of all other technicians) to climb the pole because she found this method to be a safer way to perform the work which produced the same end result. Also, the respondent left personal safety up to each technician and she did not want to risk a potential accident that wasn't necessary.

Later in the afternoon on 19th October Fisher's supervisor informed her that instead of

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[14] Fisher understood this to be similar to the only other time in nine years she had ever been asked to climb a pole.....at a safety demonstration where pole climbing was only one of many safety exercises. The pole climbing aspect was brief and she was not required to climb more than a few feet.

[15] Sometimes also referred to as 'gaffs'. The gaff is a leg iron which attaches to the leg and has a sharp, pointed structure at the side of the foot area and enables a climber to ascend or descend the pole.

demonstrating pole climbing, that she was required to report to a pole climbing class the following Monday (the first day of duty without the restrictions) in Oklahoma City. Fisher had never heard of anyone else ever having to re-attend this potentially dangerous class. She became visibly upset and asked to speak with her area manager who had previously stated she was indeed qualified for her job.[16]

Fisher spoke with her area manager about the requirement and wanted to know if it was a condition of employment. He stated he would get back with her. Prior to Fisher leaving for the day she left her cell phone number with her supervisor so that she would not miss the call. By 7 a.m. the next morning the call had not been received and Fisher had been up all night long sick to her stomach. Her worst fears about the respondent's motivations were being realized. The respondent was using the pole climbing requirement as a means of finalizing the process that began after her initial EEO report.

Fisher explained to her supervisor that the area manager had never called her back and she had been up all night long sick. She again requested a return phone call. Later that afternoon the area manager

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[16] The opposition to summary judgment reveals that after Fisher's termination, the respondent modified this course to increase the passing rate and also to decrease injuries.

called and stated that indeed the requirement would be a condition of employment.

Over the week-end Fisher again contacted the internal EEO office to lodge another complaint. Monday morning she called her supervisor and asked where she were to report in and that she had not gone to the pole climbing class. Fisher's supervisor told her they did not have anymore 'transitional work'. A few minutes later Fisher received another call directing her to report for an 'investigatory meeting'.

At this meeting Fisher relayed the discrimination and retaliation associated with the requirement and stated she was going to fight it[17]. The union at that time also requested names of anyone else ever having to re-attend pole climbing; this request was denied[18]. At the conclusion of the meeting Fisher was suspended without pay 'pending further

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[17] A transcript of the meeting was provided in Fisher's opposition to summary judgment.

[18] After the initiation of this lawsuit, respondent produced in response to discovery requests the names of individuals who allegedly were also required to retrain. There is a genuine issue of material fact as to whether these individuals were similarly situated. The union president described these comparators as like "comparing apples and oranges". The names of the other individuals allegedly required to retrain were employees who had ended their employment with respondent and at a later date were re-hired; the circumstances were entirely different. Indeed, Fisher was out on a disability leave and the only reason she was away from work for so long was due to respondent's refusal to allow her to return.

investigation'. Four weeks later Fisher was called to a meeting commonly referred to within the ranks of management as "a day in court" and known by employees to be directly associated with termination.

At the beginning of the meeting Fisher was informed by the director that the background for the condition of employment requirement was her "lengthy disability"[19]. Fisher responded by stating that what they had done and what they were continuing to do was against federal law and that they would be held accountable. Fisher was terminated at the conclusion of this meeting.

Fisher brought suit against the respondent for violations of Title VII and the Americans with Disabilities Act. The action was initiated in the Northern District of Oklahoma after exhausting administrative remedies. The District Court had jurisdiction over this matter pursuant to 42USC2000e-5(f)(3), and also 28USC 1331(federal question). The District Court entered summary judgment against Fisher on all of her claims. Fisher thereafter filed a Federal Rule of Civil Procedure 59emotion to alter/amend the judgment which the district court also denied. Fisher timely filed a notice of appeal and proceeded in the Tenth Circuit. The Tenth Circuit affirmed the district court's opinion and order, and with all due respect,

[19] Fisher's "lengthy disability" was due to the respondent's refusal to allow her to return to work.

disregarded Fisher's arguments to include the issue of mixed motives.

The issues relating to the questions presented are not unique to Fisher's claims, rather, as this petition will show, has seriously and severely divided the Circuits for some time.

To date, Fisher has not received redress or remedies that the law provides for these violations. Additionally, the respondent has not adequately been held accountable, nor deterred from these unlawful employment practices.

When Congress amended the Civil Rights Act of 1991 it was, in part, due to employers escaping liability for discrimination. A large employer such as the respondent must not be allowed to continue to manipulate the legal process in order to evade liability. Discrimination in employment is devastating for the employee discriminated against, often resulting in the loss of one's employment. The negative effects can extend to affect one's entire career.

When a job loss is due to intentional discrimination and retaliation where one is actually targeted for termination, the result is most disturbing and the effects can linger for many years. Individuals, such as Fisher, should not lose their income, benefits and retirement security, self-esteem, the opportunity to reach one's potential, and the ability to contribute to

society, all due to unlawful employment practices. At the least, redress and remedies must be ensured. Because of the vast confusion over the legal analysis to be applied at the summary judgment stage in employment discrimination cases, most plaintiff's have their cases dismissed at this critical juncture.....this is not what congress intended through the 1991 amendments.

REASONS FOR GRANTING THE WRIT

A. This Court's exercise of it's supervisory powers is warranted.

I. Article III section 2 of The United States Constitution extends the Supreme Court's power to the laws of the United States. Both of the questions presented represent substantial issues of Federal law that for years have ignited discord in the circuit courts and to this day are still causing disarray. The authority of the U.S. Supreme Court to interpret statutes and give guidance to the lower Courts is imperative to promote and maintain uniformity.

The striking differences in the application of federal employment law interfere with the objectives of the law, and the administration of justice itself. A lack of uniformity within the circuits results in a diminished understanding, and therefore misapplication, of federal employment law and drains judicial resources.

II. The U. S. Supreme Court has played a vital role in shaping the development of employment discrimination law under the Federal Statutes.

The Civil Rights Act of 1964 was a major piece of legislation which ,among other things ,prohibited discrimination in employment. In 1974 the U.S. Supreme Court heard the landmark case of McDonnell Douglas v. Green. Through this case the court established an evidentiary framework to help evaluate disparate treatment discrimination claims. The McDonnell Douglas framework became known as the 'pretext' analysis. The 1989 U.S. Supreme Court case of Price Waterhouse v. Hopkins introduced the mixed motives theory. The Court held that "once a plaintiff in a Title VII case shows that gender played a motivating part in the employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role." [20] This affirmative defense is referred to as the 'same decision defense'.

In a concurring opinion Justice O'Connor stated that "in my view, in order to justify shifting the burden on the issue of causation to the defendant, a disparate treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision.".

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[20] Price Waterhouse, 490 U.S. at 244-45.

The lower courts focused on this statement and determined that plaintiffs must present direct evidence for a mixed motive analysis and/or instruction. The 1991 Civil Rights Act was enacted to amend the Civil Rights Act of 1964. The objective was to restore and strengthen civil rights that ban discrimination in employment, and for other purposes. Congress found that existing protections and remedies under Federal law were not adequate to deter unlawful discrimination or to compensate victims of such discrimination. To that end, the remedial provisions were amended to allow for compensatory and punitive damages, and also to provide for jury trials.

The Civil Rights Act of 1991, added the verbage 'motivating factor' to explicitly prohibit any consideration of a protected characteristic in an employment practice.[21] The act also addressed the issue of employers entirely negating liability with the 'same decision defense'. If a plaintiff demonstrated that a protected characteristic was a motivating factor in the employment practice, the statute was violated. An employer could limit the

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[21] 42USC2000e-2(m)- Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

remedies available by proving it's affirmative defense, however, could not escape a finding of liability altogether. The objective was to eradicate discrimination, and therefore prohibit any consideration of a protected characteristic in an employment practice.

Twelve years later in 2003 the U.S. Supreme Court heard the Desert Palace v. Costa case.

B. There is no consensus among the Circuit Courts as to what legal analysis is to be applied at the summary judgment stage.

I. The Effect of Desert Palace

The issue in Desert Palace was a mixed motives jury instruction and whether direct evidence was needed for this type of instruction. A panel of the Ninth Circuit reversed the judgment in favor of Costa finding that it was error to give a mixed motive instruction. In an en banc decision the Ninth Circuit reversed the panel and held that direct evidence was not needed to obtain a mixed motive instruction under Title VII.

Desert Palace urged the U.S. Supreme Court to grant a writ of certiorari in part because it was concerned that the Ninth Circuit's decision would collapse the two traditional frameworks, making the "a motivating factor" standard the causation

standard for "virtually all Title VII cases." [22] Petitioner argued there was no direct evidence and therefore the McDonnell Douglas governed rather than PriceWatehouse. Respondent argued that 'a motivating factor' was the standard of causation and that circumstantial evidence was sufficient due to the statutory language which did not require a heightened evidentiary standard.[23] The Court held that direct evidence was not required to obtain a mixed motive instruction under Title VII of the Civil Rights Act, as amended[24].

At oral argument there was much discussion concerning the distinction, if any, between 42USC2000e-2(a), and 42USC2000e(m). The Court reserved the question of when 42USC2000e-2(m) applies outside of the 'mixed motive' context[25]. It is this principle which is at the heart of the chaos in the Circuit Courts.

II. The Various Frameworks

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[22] Br. For Petitioner, Desert Palace v. Costa, 539 U.S. 90 (2003), No. 02-679 at *30.

[23] See transcript of oral argument, Desrt Palace v. Costa.

[24] The holding in Desert Palace has sparked tremendous debate over it's effect on the summary judgment analysis, and has been the subject of many law review articles, ie:A Swing and a Miss, Michael Abbott, 30J.Corp.L. 573, 591, 2005, ("Overall,, with the lower courts already making their own and differing interpretations of Costa's effects, it appears that the only thing clear in the area of employment discrimination law is the existence of confusion.").

[25] Desert Palace v. Costa, 123 S. Ct, at 1251 n.1

Prior to the Civil Rights Act of 1991 the Circuit Court's generally applied the McDonnell Douglas framework for cases with circumstantial evidence, and the mixed-motives(established in Price Waterhouse) framework for cases with direct evidence. Under Price Waterhouse the employer was relieved of all liability if it could prove the 'same decision defense'. The Civil Rights Act of 1991 required a finding of liability if a plaintiff could demonstrate that the protected characteristic was a motivating factor in the employment practice. The Act simultaneously allows for the affirmative defense of 'same decision test' to limit damages, but not to evade liability.

The holding in Desert Palace that direct evidence is not required for a mixed motive instruction has the Circuit Courts in a quandary over the correct summary judgment framework to evaluate cases by. Some courts have abandoned the McDonnell Douglas framework altogether. [26] Because the 'reasonable jury' standard is the same at summary judgment and trial, and due to the Supreme Court's reference to the language of the statute in the Desert Palace decision, many believe the mixed motive analysis should be applied at the summary judgment stage.

Others are of the opinion that Desert Palace did not abrogate the McDonnell Douglas analysis and

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[26] Fixing employment discrimination law, William R. Corbett (2008) 62 SMU L. Rev. 81 (2009).

continue to evaluate cases accordingly. Still there are some Circuits who have opted to modify the third prong of the McDonnell Douglas approach according to their interpretation of the effect of Desert Palace at the summary judgment stage. These varying schools of thought, as applied in the real world, continue to result in a chaotic approach that is anything but uniform. Indeed, the only clear message from the Circuit's is that they have agreed to disagree.

The Sixth Circuit in White v. Baxter HealthCare Corp, No.07-1626(6th Cir. 2008) spoke of the raging split in the circuit courts:

> "Since Desert Palace the federal courts of appeals have, without much, if any consideration of the issue, developed widely differing approaches to the question of how to analyze summary judgment challenges in Title VII mixed-motives cases."

White held that the McDonnell Douglas framework does not apply to the summary judgment analysis of Title VII mixed motive claims.

"In order to reach a jury, the plaintiff is not required to rebut all the possible legitimate motivations of the defendant as long as the plaintiff can demonstrate that an illegitimate discriminatory animus factored into the defendant's decision to take

the adverse employment action.' White, No.07-1626(6th Cir. 2008).

A recent decision from the First Circuit, Callazo v. Bristol Meyers Squibb Mfg., Inc.,No. 09-1665, 1st Circuit, 2010

states: "To withstand summary judgment, a plaintiff need not prove by a preponderance of the additional evidence that [retaliation] was in fact the motive for the action. All a plaintiff has to do is a raise a genuine issue of fact as to whether [retaliation] motivated the adverse action." Citing Dominguez-Cruz v. Suttle Caribe, Inc., 202F.3d, 428, 433(1st Cir. 2000).

The Second Circuit has questioned whether there was a distinction between 'pretext' and 'mixed motives' cases after the amendments made by the 1991 Civil Rights Act.

"...a Title VII plaintiff is not required to show that the employer's proffered reason(s) were false or played no role in the employment decisions, but only that they were not the only reasons and that the prohibited factor was at least a 'motivating factor' ". Fields v. New York State Office of Mental Retardation and Developmental Disabilities, No. 623,-Docket 96-7523(2nd Cir. 1997).

A plaintiff in the Fourth Circuit is given two different avenues to proceed; the McDonnell Douglas framework, or, in the alternative, evidence

which demonstrates that a discriminatory more likely than not motivated the employment decision. See Diamond v.Colonial Life & Accident Ins. Co., 416F.3d 310, 318, 4th Cir. 2005, see alsoHill v. Lockheed Martin Logistics Mgm't., Inc. 354 F.3d 277,4th Circuit 2004.

The Fifth Circuit analyzes summary judgment motions per what is sometimes referred to as a 'modified McDonnell Douglas'. The first two prongs are as the traditional approach, however, in the third prong it is modified. Rather than being limited to disproving that the employers stated non-discriminatory reason is true and proving it was really a pretext, the plaintiff may demonstrate that the employers non-discriminatory reason, even if true, is only one of the reasons for the unlawful employment practice. The plaintiff must then demonstrate that a protected characteristic was also a motivating factor.

At this point in the 'modifies McDonnell Douglas' approach, the employer then must demonstrate that it would have made the same employment decision in the absence of the protected characteristic. Using this approach in a Title VII Retaliation case the Fifth Circuit recently split with the Seventh Circuit, see Smith v. Xerox Corp. No. 08-11115, 5th Circuit, 2010, also Serwatka v. Rockwell Automation Inc., 591 F.3d 957, 96, 7th Circuit 2010.

In the 2008 case of White v. Baxter HealthCare Corp., No. 07-1626, 6th Cir. the Circuit appears to

have completely abandoned the McDonnell Douglas framework. Meanwhile the Eighth Circuit is sticking to the pretext analysis and does not agree that the holding in Desert Palace has any effect. "The framework for evaluating a Title VII discrimination claim depends on the type of evidence presented in support of the claim. Where the plaintiff relies primarily on circumstantial evidence, courts apply a tripartite analysis set forth in McDonnell Douglas.". See Griffith v. City of Des Moines ,No. 03-3266, 8th Cir. 2004. Dist. Judge Paul A. Magnuson concurring in the judgment but sharply dissenting as to the effect of Desert Palace on the analysis at the summary judgment stage of employment discrimination lawsuits [27] .See also Gagnon v. Sprint Corp., 284 F.3d 839, 847-48,8th Cir. 2002 (describing two methods; McDonnell Douglas or mixed motives analysis with direct evidence. Strate v. Midwest BankCentre, Inc., 398 F. 3d 1011, 8th Cir. 2005(concluding Desert Palace did not change the summary judgment stage analysis.).

The Ninth Circuit en banc held in Costa v. Desert Palace, 299F. 838, 9th Cir. 2002 that direct evidence was not necessary for a mixed motive instruction and reversed the panels decision that overturned the trial court's decision. The U.S. Supreme Court affirmed the en banc's holding in Desert Palace. A separate panel of this same circuit used the

[27] In his dissent, Judge Magnuson explains at length why 42USC2000e-2(a) and 42USC2000e-2(m) are not mutually exclusive

McDonnell Douglas framework in Bodett v. Cox Comm., Inc., 366 F. 3d 736, 743, 9th Cir. 2004.

The Tenth Circuit Court of Appeals appears to not have addressed the impact of Desert Palace at the summary judgment phase. In Fisher's case they refused to address the issue due to inadequate arguments [28] The Eleventh Circuit still utilizes McDonnell Douglas to evaluate claims at the summary judgment stage, see Burstein v. Emtel, Inc. No. 04-12841, 11th Cir. 2005.

The United States District Courts look to the circuits for guidance and controlling precedent. Not surprisingly, the District Courts are as confused and fractured as the circuit courts on the question of what analysis to apply at the summary judgment stage for employment discrimination claims.

Perhaps the most vocal district court judge to weigh in on the Desert Palace impact at the summary judgment stage analysis is judge Paul A.Magnuson. In Dare v. Walmart Stores, Inc. 267 F.Supp.2d 987, 991-92, he states

> "The dichotomy produced by the McDonnell Douglas framework is a false one. In practice, few employment decisions are made solely on the basis of one rationale to the exclusion of all other. Instead, most employment decisions are the result of the interaction of various factors, legitimate and

[28] Fisher's lack of argument on the issue, even though it was raised, was viewed as inadequate.

> at times illegitimate, objective and subjective, rational and irrational. The court does not see the efficacy in perpetuating this legal fiction I implicitly exposed by the Supreme Court's ruling in Desert Palace.".

Judge Magnuson's view is only one that the district courts have utilized. Another approach opined is that McDonnell Douglas is still a viable framework for evaluating Title VII cases, and therefore, cases are analyzed under the burden shifting articulated by the pretext analysis. See Rozkowiak v. Village of Arlington Heights, 01 C. 5414, N.D. Ill, 2004. It is critical that a sound roadmap be provided to the lower courts on a standard legal analysis to be exercised in evaluating motions for summary judgment in employment discrimination claims.

C. Employment discrimination is a national concern

I. EEOC charge filings hit record high in 2008

Workplace discrimination charge filings with the federal agency soared nationwide to an unprecedented level in 2008.[29] This reflects a fifteen percent increase from the previous year. According to

[29] EEOC press release dated 3-11-09

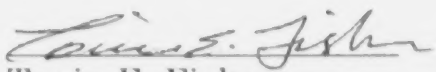
The Commission's Acting Chairman, Stuart J. Ishimaru "The EEOC has not seen an increase of this magnitude in charges filed for many years. While we do not know if it signifies a trend, it is clear that employment discrimination remains a persistent problem.". Filings of employment discrimination complaints in federal courts are also on the rise[30]. This data has increased the concern of many people about the continuance of workplace discrimination. The importance of a uniform standard at the summary judgment stage is critical for litigants, lawyers, efficiency of judicial resources, and paramount to the principle of equal justice for all.

CONCLUSION

Today, under Federal Law, the legal standard for evaluating employment discrimination claims at the summary judgment stage is fractured and fragmented. The standard varies widely from

[30] Source:Administrative Office of US Courts

Circuit to Circuit. This Court's authority is necessary to address this national concern, and to provide much needed direction to the bench, the bar, and the public at large on these significant issues of Federal Law. Petitioner respectfully prays this Court grant the petition for a writ of certiorari in this matter.



Tonia E. Fisher
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Appendix

Case: 09-5046 Document: 01018354743 Date Filed: 01/25/2010

FILED
United States Court of Appeals
Tenth Circuit
January 25, 2010

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

TONIA E. FISHER,
Plaintiff-Appellant,
v.
SOUTHWESTERN BELL TELEPHONE COMPANY, a foreign for profit business corporation,
Defendant-Appellee.

No. 09-5046

ORDER AND JUDGMENT[1]

---

[1] * After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Before **MURPHY**, **McKAY**, and **BALDOCK**, Circuit Judges.

Pro se plaintiff Tonia Fisher sued her former employer, Southwestern Bell Telephone Company (SWBT), and a holding company, AT&T Inc., asserting illegal discrimination and retaliation in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213, and Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e to 2000e-17. The district court granted summary judgment in favor of SWBT on all claims and dismissed defendant AT&T Inc. for lack of personal jurisdiction. It also denied Ms. Fisher's motion to file additional authorities out of time, motion for leave to file a third amended complaint, and motion to reconsider that issue. Ms. Fisher now appeals these adverse rulings, along with the district court's decisions on discovery matters. We affirm.

Ms. Fisher was employed by SWBT as a Customer Service Technician, responsible for repairing and installing telephone lines and equipment. A requirement for this position is the ability to climb non-step poles, and company policy recommends the use of hooks for this activity. Ms. Fisher took a short-term disability leave from August 2005 through August 2006, then worked under temporary work-related restrictions until October 2006.

After Ms. Fisher's doctor lifted the restrictions, her supervisor told her that she would

be required to demonstrate climbing a pole using hooks. Ms. Fisher responded that she had not used hooks in two years and had not used them to perform her job in nine years. In light of this statement, management decided that Ms. Fisher needed to re-take a course called New Employment Safety Training, which would allow her to review the safe method of climbing a pole using hooks. Ms. Fisher, however, felt this type of pole-climbing could be dangerous in her physical condition and unnecessary to the performance of her job. Although she was informed that her refusal to attend would be considered insubordination, Ms. Fisher did not report to the training class. At follow-up meetings, Ms. Fisher did not provide any medical information that would have excused her from participating in the training. Instead, she asserted that the requirement was discriminatory and prompted by her internal discrimination complaints: a charge lodged in 2003 while on a three-month period of unpaid suspension, a hotline call made after she was directed to re-training, and a subsequent letter from her attorney. Ms. Fisher claimed her refusal to attend the training amounted to protected opposition to illegal employment discrimination. Ms. Fisher was suspended and then discharged for insubordination.

Ms. Fisher filed this suit, claiming disability and gender discrimination and also retaliation for her earlier complaints. Her ADA claim is based on the theory that SWBT perceived her as having a psychological impairment substantially limiting the

major life activities of being emotionally stable, thinking straight, eating, and working. In appealing the district court's disposition of her claims and motions, Ms. Fisher raises several issues, with various subparts.

1. Dismissal of AT&T Inc.

AT&T Inc., a Delaware holding company with its principal place of business in Texas, filed a motion to dismiss under Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction. The district court granted the motion without holding an evidentiary hearing. We review this determination de novo, asking whether the plaintiff made a prima facie showing of facts that, if true, support jurisdiction over the defendants. *Melea, Ltd. v. Jawer SA*, 511 F.3d 1060, 1065 (10th Cir. 2007). We accept the plaintiff's allegations as true if uncontradicted by evidence from the defendants, and resolve evidentiary disputes in favor of jurisdiction. *Id.* Oklahoma's long-arm statute authorizes jurisdiction coextensive with the Due Process Clause, so that personal jurisdiction exists if a defendant has minimum contacts with Oklahoma. *Intercon, Inc. v. Bell Atlantic Internet Solutions, Inc.*, 205 F.3d 1244, 1247 (10th Cir. 2000).

AT&T Inc. presented affidavits declaring that it does not employ anyone in Oklahoma, exercise control over SWBT's operations, conduct business in Oklahoma, or have any specific contact in Oklahoma related to Ms. Fisher's lawsuit. Ms.

Fisher's responsive evidence was that she had received a mailing from AT&T Inc. at her Oklahoma home, that AT&T Inc.'s Chief Executive Officer had accepted a speaking engagement in Oklahoma, and that AT&T Inc. and SWBT had submitted a joint application to the Federal Communications Commission. She also asserted that AT&T Inc. had a national presence. The district court determined that Ms. Fisher's evidence was insufficient to demonstrate that AT&T Inc. had purposely directed its activities toward Oklahoma. Therefore, it concluded that Ms. Fisher did not make a prima facie showing that could support the exercise of personal jurisdiction over AT&T Inc.

None of Ms. Fisher's arguments on appeal persuades us to reverse the District court's decision. Moreover, we conclude that the district court did not abuse its broad discretion in denying Ms. Fisher the opportunity to conduct jurisdictional discovery. *Bell Helicopter Textron, Inc. v. HeliQwest Int'l, Ltd.*, 385 F.3d 1291, 1298-99 (10th Cir. 2004).

2. Leave to Amend Complaint

About a year after filing her complaint, Ms. Fisher sought leave to file a third amended complaint to add a state-law tort claim. The district court determined that the facts and the law supporting the proposed state-law claim were known to her at the time she filed her initial complaint. It therefore denied the motion to amend due to the lengthy delay without a reason. Later it denied her

motion to reconsider, again finding undue delay and also futility.

Whether to permit an untimely amendment is generally a question entrusted to the district court's discretion. *See Miller ex rel. S.M. v. Bd. of Educ. Of Albuquerque Pub. Sch.*, 565 F.3d 1232, 1249 (10th Cir. 2009). "An abuse ofdiscretion occurs when a judicial determination is arbitrary, capricious or whimsical. It is not merely an error of law or judgment. . . ." *United States v. Wright*, 826 F.2d 938, 943 (10th Cir. 1987). And "[i]t is well settled in this circuit that untimeliness alone is a sufficient reason to deny leave to amend." *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1365 (10th Cir. 1993). Under the applicable standard, we see no basis for reversing the district court's rulings.

3. Discovery Orders and Other Pretrial Rulings

Ms. Fisher challenges the district court's decision to affirm discovery orders entered by magistrate judges. We review discovery rulings for abuse of discretion. *See Regan-Touhy v. Walgreen Co.*, 526 F.3d 641, 647 (10th Cir. 2008).

Ms. Fisher's primary contention is that the district court erred in allowing SWBT access to her psychotherapy records. *Jaffee v. Redmond*, 518 U.S. 1, 12-13 (1996) holds there is a psychotherapist-patient privilege in federal cases. But this "privilege is not absolute." *Doe v. Oberweis Dairy*, 456 F.3d 704, 718 (7th Cir. 2006); *see also Jaffee*, 518 U.S. at 15, n.14 ("Like other testimonial privileges, the

patient may of course waive the protection."). "Numerous courts since *Jaffee* have concluded that, similar to attorney-client privilege that can be waived when the client places the attorney's representation at issue, a plaintiff waives the psychotherapist-patient privilege by placing his or her medical condition at issue." *Schoffstall v. Henderson*, 223 F.3d 818, 823 (8th Cir. 2000) (collecting cases).

We agree with the district court that Ms. Fisher's request for emotional-distress damages placed her psychological state in issue and entitled SWBT to discover her therapy records. We also see no abuse of discretion in the district court's denial of Ms. Fisher's motion for additional discovery, motion for disclosure and recusal of SWBT's in-house counsel, motion to strike SWBT's expert report, and motion to supplement her summary-judgment response.

4. Summary-Judgment Rulings

We review the district court's summary-judgment rulings de novo, "taking the facts and the reasonable inferences to be drawn from them in the light most favorable to the nonmoving party." *Trainor v. Apollo Metal Specialties, Inc.*, 318 F.3d 976, 979 (10th Cir. 2002). Applying the same legal standard as the district court, we will affirm "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is

entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

Because Ms. Fisher is proceeding pro se, we have construed her briefs liberally and "have tried to discern the kernel of the issues she wishes to present on appeal." *de Silva v. Pitts*, 481 F.3d 1279, 1283 n.4 (10th Cir. 2007). Nevertheless, "[t]his liberal treatment is not without limits." *Kay v. Bemis*, 500 F.3d 1214, 1218 (10th Cir. 2007). We do not "take on the responsibility of serving as [her] attorney in constructing arguments and searching the record." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005). Thus we do not address her inadequate arguments, such as the newly asserted theory that the district court should have applied a mixed-motive analysis to her claims.

ADA Claim

To survive summary judgment on her ADA claim that SWBT regarded her as disabled, Ms. Fisher was required to present some evidence showing that SWBT had "mistaken beliefs about [her] abilities." *Jones v. U.P.S., Inc.*, 502 F.3d 1176, 1190 (10th Cir. 2007). SWBT must have "mistakenly believe[d] that [she] has a physical impairment that substantially limits one or more major life activities'" or "that an actual, non-limiting impairment substantially limits one or more major life activities." *Id.* (quotation omitted).

The district court's entry of summary judgment is based on its determination that Ms.

Fisher produced no evidence showing that SWBT perceived her as unable to perform any major life activity, including the ability to be emotionally stable, think straight, eat, and work. We agree with the district court's evaluation of the evidence.

On appeal, Ms. Fisher makes two arguments specific to her ADA claim. First, she asserts that the district court failed to view her claim in a broad enough context. It is apparent, however, that the district court reached its conclusion only after reviewing the entire record. Second, Ms. Fisher argues that the district court's ruling did not take into account this court's statement that "an employer who is unable or unwilling to shed his or her stereotypic assumptions based on a faulty or prejudiced perception of an employee's abilities must be prepared to accommodate the artificial limitations created by his or her own faulty perceptions." *Kelly v. Metallics W.*, 410 F.3d 670, 676 (10th Cir. 2005). This directive, however, has no application here, where there is no indication that SWBT perceived Ms. Fisher as disabled. The district court properly entered summary judgment on the ADA claim.

Gender-Discrimination and Retaliation Claims

Applying the burden-shifting scheme of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to SWBT's motion for summary judgment, the district court concluded that Ms. Fisher established prima facie cases of gender

discrimination and retaliation. It further decided that SWBT proffered a legitimate, nondiscriminatory reason for the termination--insubordination. Describing the lack of support for Ms. Fisher's allegations and SWBT's evidence that it applied a gender-neutral practice of requiring re-training after a period of absence, the district court determined that Ms. Fisher had not established a genuine issue of material fact on whether SWBT's proffered reason was pretextual. Accordingly, it concluded that SWBT was entitled to summary judgment.

Thus, the sole question on appeal is whether Ms. Fisher submitted sufficient evidence of pretext to defeat the motion for summary judgment. To do so, Ms. Fisher was required to produce evidence that SWBT's non-discriminatory reason is "unworthy of belief." *Randle v. City of Aurora*, 69 F.3d 441, 451 (10th Cir. 1995). This burden can be met with "evidence of such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence." *Argo v. Blue Cross & Blue Shield of Kan., Inc.*, 452 F.3d 1193, 1203 (10th Cir. 2006) (quotation omitted). We examine "the facts as they appear to the person making the decision to terminate plaintiff." *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1231 (10th Cir. 2000).

In this court, Ms. Fisher repeats her accusations of discrimination and retaliation.

"Unsupported conclusory allegations, however, do not create an issue of fact." *Finstuen v. Crutcher*, 496 F.3d 1139, 1144 (10th Cir. 2007) (quotation omitted). Nothing in the record suggests that Ms. Fisher can establish pretext. The district court properly granted summary judgment on Ms. Fisher's gender-discrimination and retaliation claims.

5. Denial of Postjudgment Relief

Finally, Ms. Fisher asserts that the district court erred in denying her motion for reconsideration of the district court's summary-judgment decision, repeating her earlier arguments. We review this decision for an abuse of discretion. *See Barber ex rel. Barber v. Colo. Dep't of Revenue*, 562 F.3d 1222, 1228 (10th Cir. 2009). Thus, such "relief is appropriate only where the court has misapprehended the facts, a party's position, or the controlling law." *Id.* (quotation omitted). "[B]ecause we are affirming the district court's grant of summary judgment under the broader de novo standard, we do not find that the district court abused its discretion in denying the . . . motion for reconsideration."
Id.

SWBC's motion to strike attachments to Ms. Fisher's reply brief, which are not part of the record on appeal, is GRANTED. Ms. Fisher's motion to take judicial notice of these attachments is DENIED. The judgment of the district
court is AFFIRMED.

Entered for the Court
Michael R. Murphy
Circuit Judge

Elisabeth A. Shumaker
Clerk of Court

Douglas E. Cressler
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
OFFICE OF THE CLERK
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157
January 25, 2010

Ms. Tonia Elizabeth Fisher
11351 North Ridge Road
Plymouth, MI 48170

RE: 09-5046, Fisher v. Southwestern Bell Telephone Co

Case: 09-5046 Document: 01018354743 Date Filed: 01/25/2010

Dist/Ag docket: 4:07-CV-00433-CVE-FHM

Dear Ms. Fisher:
Enclosed is a copy of the order and judgment.
Please contact this office if you have questions.

Sincerely,
s/Elisabeth A. Shumaker
Clerk of the Court
cc:
Mary C. Coulson
Robyn Marie Funk
Mary Lynn Lohrke
Kimberly Lambert Love
EAS/lg

FILED March 12, 2010

United States Court of Appeals Tenth Circuit **Elisabeth A. Shumaker Clerk of Court**

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

TONIA E FISHER,
Plaintiff-Appellant,
v.
SOUTHWESTERN BELL TELEPHONE COMPANY, a foreign for profit business corporation,
Defendant-Appellee.

No. 09-5046
(D.C. No. 4:07-CV-00433-CVE-FHM)
(N.D. Okla.)

ORDER

Before **MURPHY**, **McKAY**, and **BALDOCK**, Circuit Judges.

This matter is before the court on appellant Tonia E. Fisher's petition for panel rehearing with suggestion for rehearing en banc. Upon consideration, the petition for panel rehearing is DENIED. The suggestion for rehearing en banc was transmitted to

all of the members of the court in regular active service in accordance with Rule 35 of the Federal Rules of Appellate Procedure. No judge called for a poll. Accordingly, the suggestion for rehearing en banc is DENIED.

Entered for the Court,
s/Elizabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

Case 4:07-CV-00433-CVE-FHM Document 296 Filed in USCD ND/OK on 04/06/2009

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

TONIA E. FISHER,
Plaintiff,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,
Defendant.

Case No. 07-CV-0433-CVE-FHM

OPINION AND ORDER

Now before the Court are the following motions: Defendant's Motion for Summary Judgment and Brief in Support Thereof (Dkt. ## 222, 228)[1]; Plaintiff's Motion for Relief Pursuant to Federal Rules of Civil Procedure 60(b)(1), (2), (6) and Brief in Support (Dkt. # 223); Plaintiff's Motion for District Court Judge to Review Magistrate's Rulings (Dkt. # 271); and Plaintiff's Motion to File a Surreply to

[1] Pursuant to General Order 08-11, defendant filed a sealed motion for summary judgment (Dkt. # 222) and a separate redacted version (Dkt. # 228) not under seal. In this Opinion and Order, the Court will refer to the sealed version (Dkt. # 222) when citing defendant's motion and exhibits, as it contains complete copies of all evidentiary materials.

Defendant's Reply in Support of It's Summary Judgment Motion and Request for an Expedited Ruling (Dkt. # 275). Plaintiff has alleged claims of gender discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, as amended, et seq. (Title VII), disability discrimination under the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. ("ADA"), and retaliation claims under Title VII and the ADA. Defendant seeks summary judgment on each of plaintiff's claims. In addition, plaintiff has requested reconsideration of an opinion and order (Dkt. # 133) partially denying a motion to amend and she seeks review of every discovery order entered by magistrate judges in this case.

I.

Southwestern Bell Telephone Company (SWBT) hired Tonia E. Fisher in 1997 as a systems technician. Dkt. # 222, Ex. 1, at 21. SWBT required Fisher to take a written examination and a new employee safety training (NEST) course that included a safe pole climbing examination of an employee's ability to climb a non-step pole with hooks or gaffs. Fisher passed her written examination on the first attempt, and she subsequently passed the pole climbing test on her second attempt later in 1997. Id. Fisher claims that, during her tenure as a systems technician, she used an aerial ladder when climbing was required and she never climbed a pole using hooks. Dkt. # 255, at 1.

In October 1999, Fisher applied for a position as a customer service technician (CST) in SWBT's Oklahoma Installation and Repair Organization (Oklahoma I&R). Dkt. # 222, Ex.1, at 22. She was approved for a transfer to Oklahoma I&R later that month. The job description provided by SWBT states that a CST:

> Performs installation, testing and maintenance operations on pole line plant, cable sheath, conductors and terminations, service wire, carrier, power and telephone equipment and associated wiring; locates and corrects faults in such equipment and wiring; removes and rearranges cross connections on cable plant and on distributing frames when required; prepares records and reports as necessary; handles other generally associated operations and work assignments.

Id., Ex. 2-A, at 1. An essential function normally required for the position of CST is to "climb[] step and non-step poles to a working height of a minimum of 18 feet and/or climb[] ladders and work[] aloft with hand tools." Id.

Fisher states that aerial work constituted about ten percent of her job, but she used a bucket truck or aerial ladder whenever aerial work was required. Dkt. # 255, at 1. She states that she found

these methods to be safer than climbing a pole with hooks, and she did not use hooks to climb a pole during her employment as a CST.[2] Id. at 1-2 ("I never one time climbed a pole with gaffs while performing by job duties."). Fisher states that she was meeting or exceeding her supervisors' expectations and received exemplary performance reviews from 1999 to 2001. Id. at 2. In 2002, SWBT suspended Fisher for four months without pay because Fisher failed to immediately report an alcohol-related driving offense she received outside work. Id. at 2. She claims that she was unaware of a requirement to report driving violations occurring outside work and did not intentionally violate SWBT policy. Id. Fisher filed an internal grievance alleging that she was the victim of gender discrimination in Spring 2003, because she believed this disciplinary policy was not being applied equally to male and female employees.[3] She claims that SWBT allowed

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[2] Fisher states that she attended a "rodeo" in 2004 and demonstrated certain physical skills, but she does not specifically state whether pole climbing was required at the rodeo. Dkt. #255, at 3. However, in her deposition, plaintiff states that she had not climbed a pole with hooks for at least nine years. Dkt. #222, Ex. 1, at 54.

[3] The male employee who was allegedly treated differently was the president of SBC Oklahoma. Plaintiff alleges that he was arrested for driving under the influence of alcohol and carrying a loaded firearm. Id. at 2. However, the summary judgment record contains no evidence suggesting that the subject SWBT policy was applied unequally to a male employee within the Oklahoma I&R or to any other similarly situated employee of SWBT.

her to return to work under the condition that she submit to random drug and alcohol testing. Fisher viewed this requirement as a form of retaliation for reporting gender discrimination. Id.

Fisher claims that she was "scrutinized and targeted for termination" following her return to work from the four month suspension. Id. at 3. In August 2005, Fisher requested and was approved for short-term disability leave. Dkt. # 222, Ex. 4, at 1. Fisher received treatment from a physician during her disability leave and, due to work-restrictions recommended by her physician, did not return to work until August 2006. While she was on disability leave, she kept in contact with the Area Manager, Curtis James. He advised Fisher that she might have to be retested on certain skills when she returned to work. Dkt. # 255, at 3. Fisher viewed this as a "red flag" that she would be sent for retraining upon her return to work and believed that SWBT would use retraining as an excuse to initiate the termination of her employment. Id. Fisher also states that she informed James that her physician "suspected" she had cancer, but additional testing showed that she did not have cancer. Id. at 15. Fisher does not state whether she notified James of her test results. Fisher's physician lifted some of her

work restrictions on August 21, 2006, and she returned to work in a temporary position through SWBT's Transitional Work Program. Dkt. # 222, Ex. 1, at 47. According to SWBT documents, the goal of the Transitional Work Program is "to provide a safe transition to full duty using modified or limited assignments immediately following . . . a short term disability . . . ." Id., Ex. 4-A, at 1. The Program is not designed for employees with long-term or permanent work restrictions but, instead, is intended to be a limited 60 day period of light or transitional work to return an employee to full functional capacity. Id. The 60 day time limit can be extended up to 150 days if the employee provides "documented medical information to indicate recovery is continuing." Id.

On October 19, 2006, Fisher's physician released her to return to work without any restrictions. Id., Ex. 5. Fisher's immediate supervisor, Tareena Johnson, informed Fisher that she would resume her full responsibilities as a CST on Monday, October 23, 2006. Id., Ex. 1, at 50. Johnson informed Fisher that she would be required to demonstrate that she could safely remove and replace a ladder from a truck and use hooks to climb a pole. Id. at 51. Fisher stated that she did not have any hooks in her truck and had not carried hooks for some time. Id. Based on Fisher's return to work from a lengthy absence and her admission that she did not have hooks, James was concerned

that Fisher had not used certain skills for some time and he recommended that Fisher attend a two week NEST course, beginning on Monday, October 23, 2006, to refresh her skills. Id., Ex. 2, at 3.
This recommendation was approved by James' supervisor, Charles Ciskowski. Id., Ex. 3, at 2. Johnson told Fisher that she would be required to attend NEST in lieu of demonstrating the specific skills initially identified by Johnson. Dkt. # 255, at 5. Fisher feared that SWBT was using NEST as a means to initiate the termination process, and she asked Johnson to call James to verify what impact passing or failing NEST would have on her employment. Dkt. # 222, Ex. 1, at 51. Johnson called James while Fisher was present. Id. at 52. James allegedly stated that Fisher "might be given another chance," but Fisher claims that it was unclear if passing NEST was a condition of continued employment. Id. at 52. James states that it was not unusual to require an employee returning from a long period of leave to re-attend NEST and recalled another CST, Orvel Merryman, a male, that he required to re-attend NEST as a condition of continued employment. Id., Ex. 2, at 4. James also states that the same condition was imposed on him when he was a CST and returned from leave. Id. From 2001 to 2008, Ciskowski states that he was aware of eight male CSTs, in addition to James and Merryman, who were required to re-attend NEST

before returning to work after taking leave. Id., Ex. 8, at 3.

Fisher did not attend work on Friday, October 20, 2006. Johnson and James called Fisher at her home and discussed her concerns about attending NEST. James explained that attending NEST was a condition of Fisher's continued employment with SWBT, and it would be treated as insubordination if Fisher refused to attend. Id., Ex. 2, at 4. Fisher acknowledged that she did not have hooks and had not climbed a pole for nine years, but she told James that she had never been required to climb a pole using hooks when performing her job as a CST. Id., Ex. 1, at 54. She expressed her view that climbing a pole with hooks was not safe and suggested that there were safer ways to perform aerial work. Id. James informed Fisher that she could be excused from NEST if she provided a doctor's note, but she would otherwise be expected to attend NEST on the following Monday. Id. at 55; id., Ex. 2, at 4.

Fisher failed to report to NEST on October 23, 2006, and James called a meeting with Johnson, Fisher, and Fisher's union steward, Bob Martin. Id., Ex. 2, at 4. Fisher explained that she did not report to NEST because she believed that this requirement was discriminatory and was imposed in retaliation for an internal complaint she filed in 2003. Id. Fisher acknowledged that neither Johnson nor James were

her supervisors in 2003. Id., Ex. 7, at 1.[4] James suspended Fisher without pay for insubordination and began to draft a separation proposal recommending Fisher's termination on October 24, 2006. Id., Ex. 2, at 4-5. He reviewed Fisher's personnel file and found that she had previously been suspended for refusing to follow instructions from a manager in January 2005. Id. at 6. Fisher states that she filed an internal grievance (SWBT hotline call) of gender discrimination with SWBT on October 22, 2006, the Sunday before the Monday NEST training, and she threatened to file a claim of disability discrimination with the Equal Employment Opportunity Commission. Dkt. # 255, at 6. She also contacted an attorney, Jeff Nix, who sent a letter to SWBT on October 27, 2006, notifying it that Fisher intended to file a charge of discrimination with the EEOC and any adverse employment action against Fisher would be construed as retaliation. Dkt. # 222, Ex. 11-G, at 2. James states that he did not learn of the internal grievance and Fisher's threats to file a charge with an outside agency until at least November 8, 2006 and he had already submitted a separation proposal

[4] Plaintiff secretly brought an audio recorder to the October 23, 2006 meeting, and during discovery provided defendant with a handwritten transcript of the meeting. Dkt. # 255, at 6. Defendant has attached a complete copy of the transcript to its motion for summary judgment. See Dkt. # 222, Ex. 7.

to Ciskowski recommending Fisher's termination. Id., Ex. 2, at 6. On November 17, 2006, plaintiff received a phone call notifying her that no evidence of discrimination was found during an internal investigation. Dkt. # 255, at 6.

On November 17, 2006, James and Ciskowski held a final meeting[5] with Fisher concerning her potential termination and asked if she wished to present additional information concerning her refusal to attend NEST. Fisher did not provide any medical evidence suggesting that she was unable to perform the job of a CST and she denied that she was suffering from any disability on that date. Dkt. # 222, Ex. 1, at 58. Fisher claims that Ciskowski referred to her "lengthy disability" as the basis for requiring Fisher to attend NEST. Dkt. # 255, at 6. James' notes from the meeting reflect that Ciskowski referred to a "lengthy disability," but the context of Ciskowski's statement was that "Tonia was directed to go to training after a lengthy disability and because by her own words she admitted she had not climbed in some time." Dkt. # 222, Ex. 2-H, at 2. Ciskowski also reminded Fisher that pole climbing is an essential duty of a CST's job and Fisher had admitted that "she doesn't climb poles." Id. Ciskowski added that "the most effective way to be taught to climb poles after returning from a

[5] Plaintiff refers to this meeting as a "day in court" meeting. Dkt. # 255, at 6.

disability is in a classroom environment with all the proper equipment and with a qualified instructor." Id. Fisher threatened to hold SWBT accountable for illegally terminating her employment, but she did not offer any medical evidence showing that she was physically unable to attend a pole climbing class. Id. At the conclusion of the meeting, Ciskowski informed Fisher that she would be terminated for insubordination due to her failure to report to NEST.

Fisher submitted a general intake questionnaire to the EEOC on December 5, 2006, alleging that she was fired as a result of gender and disability discrimination and in retaliation for reporting unlawful discrimination. Id., Ex. 11-C. A formal charge was drafted and signed by Fisher on the same day, alleging claims of gender and disability discrimination only. Id., Ex. 11-D. Fisher alleged that male employees were not required to retake NEST or a pole-climbing class after returning from leave and she was treated differently than similarly situated male employees. She also alleged that SWBT perceived her to be disabled and she was terminated due to this mistaken perception. Id.

On August 8, 2007, plaintiff filed this lawsuit against defendant AT&T Corp., alleging claims of gender discrimination, disability discrimination, and retaliation. Dkt. # 2. Plaintiff was represented by counsel at that time, but her attorneys subsequently withdrew from their representation of plaintiff and Fisher notified the Court of her intention to

represent herself. Dkt. # 7, 8. Plaintiff filed an amended complaint (Dkt. # 9) adding new factual allegations in support of her claims. AT&T Corp. sought dismissal of plaintiff's claims because it was not plaintiff's employer. Plaintiff conceded that she had named the wrong defendant, and she was granted permission to file a second amended complaint (Dkt. # 25) naming the correct defendant.

In her second amended complaint, plaintiff named both AT&T Inc. and SWBT as defendants. SWBT moved to dismiss plaintiff's claims premised on an a 2002 suspension, as well as plaintiff's retaliation claims under Title VII and the ADA because plaintiff did not exhaust her administrative remedies for these claims. AT&T Inc. sought dismissal of plaintiff's claims on the ground that the Court did not have personal jurisdiction over it. Dkt. # 45. Both motions were granted. Dkt. # 55. AT&T Inc. was dismissed as a party and plaintiff's retaliation claims and her claims of gender discrimination based on a 2002 suspension were dismissed.

On August 15, 2008, plaintiff filed a motion to amend (Dkt. # 78) requesting leave to file a third amended complaint reasserting her retaliation claims and new state law claims. SWBT opposed plaintiff's motion on the grounds that the proposed amendments were untimely and futile. On October 21, 2008, the Court entered an opinion and order (Dkt. # 133) granting in part and denying part

plaintiff's motion. The Court found that the EEOC inadvertently omitted retaliation claims from plaintiff's original EEOC charge and the EEOC subsequently issued an amended charge to correct this oversight. The amended charge issued by the EEOC on its own initiative was sufficient to exhaust plaintiff's administrative remedies for these claims. Dkt. # 133, at 7-8. Even though there was some delay in bringing these claims, plaintiff provided a reasonable explanation for the delay and was permitted to amend her complaint to add retaliation claims under Title VII and the ADA. However, the Court found that plaintiff failed to offer a reasonable explanation for her delay in seeking to add state law claims. Plaintiff's proposed state law claims were based on the same facts as her federal employment discrimination claims and her argument that she was unaware of remedies provided by Oklahoma law did not excuse her delay in seeking to amend. Id. at 8-9. As an alternative holding, the Court found that it would be futile to allow plaintiff to amend to add state law claims, because Title VII and the ADA provided an adequate remedy for alleged discrimination and she could not state a claim under Burk v. K-Mart Corp., 770 P.2d 24 (Okla. 1989), based on Oklahoma law at that time. Dkt. # 133, at 14-15.

On December 16, 2008, the Oklahoma Supreme Court answered certified questions submitted by the United States District Court for the

Eastern District of Oklahoma concerning the availability of a Burk tort for alleged victims of age discrimination. See Kruchowski v. The Weyerhaeuser Co., 202 P.2d 144 (Okla. 2008). In Kruchowski, the Oklahoma Supreme Court found that victims of age discrimination could bring a claim for discharge in violation of public policy under Burk. The Oklahoma Supreme Court did not directly address whether Title VII or similar federal statutes provided an adequate remedy. Instead, it held that "a plaintiff may pursue a state law claim for wrongful discharge in violation of public policy when the available remedies to the same class of employment discrimination victims are not uniform and evenhanded--regardless of whether the remedies originate under Federal or State law." Id. at 153. A Burk tort is available to a plaintiff when the available remedies under federal or state law are not "commensurate" with remedies provided by common law. Id.

On February 10, 2009, SWBT filed a motion for summary judgment on all of plaintiff's claims. Dkt. # 222. On the next day, Fisher filed a motion asking the Court to reconsider its opinion and order partially denying her motion to amend. Dkt. # 223. She reasserts her arguments concerning delay and claims that her lack of knowledge of the law provides an adequate explanation for any delay in filing a motion to amend. Fisher also seeks review of every discovery ruling entered by the magistrate judges in

this case. Dkt. # 271. She claims that she was not aware of Fed. R. Civ. P. 72 and did not know that she needed to file an appeal within ten days of the magistrate judges' orders. This case was assigned to Magistrate Judge Sam A. Joyner until he retired on January 2, 2009. Judge Joyner entered an order (Dkt. # 123) granting in part and denying in part a motion to compel filed by Fisher. Thereafter, Magistrate Judge Frank H. McCarthy ruled on numerous discovery motions filed by both parties. See Dkt. # 230. Plaintiff's motion to review all discovery orders entered by the magistrate judges has been re-docketed as an appeal of two specific written discovery orders (Dkt. ## 123, 230).

II.

Plaintiff asks the Court to reconsider its opinion and order (Dkt. # 133) partially denying her motion for leave to file a third amended complaint (Dkt. # 79). She argues that her proposed state law claims are not futile in light of Kruchowski and reasserts her argument that her lack of knowledge of state law remedies excuses any delay in filing a motion to amend. Defendant responds that the Court correctly determined that plaintiff unduly delayed seeking leave to amend to add state law claims and plaintiff is not entitled to relief under Fed. R. Civ. P. 60(b).

Plaintiff requests relief under Fed. R. Civ. P. 60(b)(1), (2), and (6), but her motion is more properly

characterized as a motion to reconsider.[6] The Court treats plaintiff's motion to reconsider under Fed.R.Civ.P. 54(b), as the underlying opinion and order (Dkt. # 133) is not a final order or judgment. See Raytheon Constructors, Inc. v. Asarco Inc., 368 F.3d 1214, 1217 (10th Cir. 2003). Plaintiff's motion does not address the appropriate standard of review for a motion to reconsider or a Rule 60(b) motion, but her motion implies the Court should reconsider its opinion and order under a de novo standard. The Court may, however, call into play the legal standards applicable to a Rule 59(e) motion to alter or amend judgment when reviewing a motion to reconsider. See, e.g., Official Committee of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand LLP, 322 F.3d 147, 167 (2d Cir. 2003). A motion to reconsider, like a motion to alter or amend judgment, should be granted only upon the following grounds: "(1) an intervening change in the controlling law, (2) new evidence previously unavailable, [or] (3) the need to correct clear error or prevent manifest injustice." Servants of the Paraclete v. Does, 204 F.3d 1005, 1012 (10th Cir.

[6] Plaintiff cites Rule 60(b) in the title of her motion, but does not provide a standard of review under Rule 60(b) or even cite Rule 60(b) within the body of her motion. Instead, she argues that the Court should reconsider its opinion and order due to a misunderstanding of plaintiff's arguments or a misapplication of the law.

2000); see Adams v. Reliance Standard Life Ins. Co., 225 F.3d 1179, 1186 n.5 (10th Cir. 2000). The Court will exercise its discretion to review plaintiff's motion under the standards applicable to Rule 59(e) motions. A district court does not abuse its discretion if it refuses to reconsider arguments that have already been considered and rejected. See Servants, 204 F.3d at 1009; Van Skiver v. United States, 952 F.2d 1241, 1243 (10th Cir. 2003). Reconsideration is "not available to allow a party to reargue an issue previously addressed by the court when the re-argument merely advances new arguments or supporting facts which were available for presentation at the time of the original argument." FDIC v. United Pacific Ins. Co., 152 F.3d 1266, 1272 (10th Cir. 1998) (quoting Cashner v. Freedom Stores, Inc., 98 F.3d 572, 577 (10th Cir. 1996)).

Plaintiff claims that her motion to reconsider is timely, because Kruchowski was decided on December 16, 2008 and her motion to reconsider is based, in part, on Kruchowski. However, Kruchowski does not provide a sufficient explanation for plaintiff's delay in filing this motion. Plaintiff filed her motion to reconsider on February 11, 2009, nearly two months after Kruchowski was decided. In total, plaintiff waited almost four months after the Court entered its opinion and order on October 21, 2008 before filing a motion to reconsider. Trial is less than a month away and it would prejudice defendant if plaintiff were allowed to amend her complaint so

close to trial. The Court also notes that plaintiff filed her motion to reconsider after defendant filed its motion for summary judgment, and this creates an inference that plaintiff is seeking leave to amend to bolster her chances of surviving summary judgment. If plaintiff strongly disagreed with the Court's opinion and order, she should have immediately raised her arguments in a timely motion to reconsider. Dkt. # 133, at 9-10. This is especially true when the Court denied plaintiff's motion to amend on the basis of undue delay. Under the circumstances, a four month delay is an unreasonable period of delay to file a motion to reconsider or a Rule 60(b) motion, and untimeliness is a sufficient reason to deny plaintiff's motion. See White v. American Airlines, Inc., 915 F.2d 1414, 1425 (10th Cir. 1990) (delay may be sufficient reason to deny a Rule 60(b) motion if plaintiff has not provided a justification for any delay).

Even if the Court were to reach the merits of plaintiff's motion to reconsider, the motion is meritless and the Court would not vacate its prior opinion and order. The Court's opinion and order was not a first draft, and the Court will not revisit arguments that should have been presented before or have already been rejected. The Court finds that its prior opinion and order resolved all of the issues raised in plaintiff's motion to reconsider, except plaintiff's argument that Kruchowski permits plaintiff to allege a Burk

tort. However, plaintiff's proposed state law claims are futile regardless of Kruchowski based on the Court's findings in this Opinion and Order. Plaintiff acknowledges that her proposed state law claims are based on the same facts as her federal law claims. Dkt. # 255, at 8. As will be discussed below, the Court has reviewed the evidence submitted by both parties and has found no genuine issue of material fact raising an inference that plaintiff was the victim of gender or disability discrimination. See infra, at IV(C)-(E). To state a Burk tort, a plaintiff must be able to allege that he or she was terminated for a reason that violates an Oklahoma public policy. Vasek v. Bd. of County Comm'rs of Noble County, 186 P.3d 928 (Okla. 2008). If plaintiff can not show that she was terminated as a result of gender or disability discrimination, she can not establish that her termination violated Oklahoma public policy. Therefore, plaintiff's proposed state law claims would be futile and her motion to reconsider would be denied on its merits.

III.

Plaintiff asks the Court to review every discovery ruling by the magistrate judges. Dkt. # 275. She states that she did not understand the difference between a district judge and a magistrate judge and was unaware of Fed. R. Civ. P. 72 and, due to her confusion, did not file a timely appeal of the magistrate judges' rulings. Id. at 1-2. She does not

appeal a specific ruling by any of the magistrate judges who ruled on discovery matters, nor does plaintiff raise any specific grounds for challenging any discovery rulings in this case.

Rule 72(a) provides that a party may file objections to any non-dispositive order of a magistrate judge within ten days of receiving the order. The district judge must consider any timely appeal of a magistrate judge's order and may modify or set aside all or part of any order that is clearly erroneous or contrary to law. Fed. R. Civ. P. 72(a). A district court has discretionary authority to consider an untimely objection to a magistrate judge's order. See Allen v. Sybase, Inc., 468 F.3d 642, 658 (10th Cir. 2006). However, untimely appeals of a magistrate judge's order "frustrate[] the policy behind the Magistrate's Act, i.e., to relieve courts of unnecessary work" and result in a waste of judicial resources. Frontier Refining, Inc. v. Gorman-Rupp Co., Inc., 136 F.3d 695, 706 (10th Cir. 1998).

Plaintiff's motion seeking a review of every discovery ruling in this case should be denied due to the lack of specificity and the untimeliness of her motion. Plaintiff's motion fails to provide any notice of the basis of her appeal other than to state that plaintiff has "disagreed" with some rulings by the magistrate judges. Dkt. # 271, at 1. This Court does not review a non-dispositive ruling of a magistrate judge unless a party raises a specific and timely objection to a particular ruling. Plaintiff's request for

review of every discovery ruling entered by a magistrate judge is contrary to the spirit of Rule 72 and would be a waste of judicial resources. Plaintiff claims that she was not aware of Rule 72 until she recently "discovered" this rule when drafting her contributions to the agreed pretrial order. Dkt. # 271, at 2. This is similar to other arguments offered by plaintiff throughout this case concerning her unfamiliarity with the legal process due to her pro se status. Throughout the discovery process, plaintiff has filed motions to compel discovery and appropriate responses to defendant's discovery motions, and she has exhibited a working knowledge of the discovery process. This case has been pending for over a year and a half and plaintiff's repeated assertion that she is unfamiliar with the Federal Rules of Civil Procedure is no longer a valid excuse for plaintiff's untimely filings.[7] In any event, the Court has independently reviewed the written orders of the magistrate judges (Dkt. ## 123, 230) and the Court does not find that these orders were clearly

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[7] Plaintiff's motion could not be treated as a timely appeal of any order entered by a magistrate judge in this case. The most recent ruling by a magistrate judge was issued on February 18, 2009, and plaintiff's motion was filed on March 18, 2009. Dkt. # 230. Most of the discovery rulings in this case were entered in September 2008, and the time to appeal those orders has long since passed.

erroneous or contrary to law. Quite to the contrary, the magistrate judges considered plaintiff's motions to compel and granted her requests for discovery when she was seeking relevant or unprivileged information. Thus, plaintiff's appeal of the magistrate judge's discovery orders should be denied.

V.

Defendant seeks summary judgment on plaintiff's claims of gender discrimination, disability discrimination, and retaliation. Plaintiff argues that genuine issues of material fact preclude summary judgment on each claim. Consistent with Supreme Court and Tenth Circuit precedent, the Court will construe plaintiff's pro se pleadings liberally when ruling on defendant's motion for summary judgment. Haines v. Kerner, 404 U.S. 519, 520 (1972); Gaines v. Stenseng, 292 F.3d 1222, 1224 (10th Cir. 2002). "Although '[a] pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers,' . . . 'pro se parties [must] follow the same rules of procedure that govern other litigants.'" Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 840 (10th Cir. 2005) (quoting Nielsen v. Price, 17 F.3d 1276, 1277 (10th Cir. 1994)).

A.

Summary judgment pursuant to Fed. R. Civ. P. 56 is appropriate where there is no genuine issue

of material fact and the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Kendall v. Watkins, 998 F.2d 848, 850 (10th Cir. 1993). The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex, 477 U.S. at 317. "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Id. at 327.

"When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) (citations omitted). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the [trier of fact] could reasonably find for the plaintiff."

Anderson, 477 U.S. at 252. In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 250. In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. Garratt v. Walker, 164 F.3d 1249, 1251 (10th Cir. 1998).

B.

Plaintiff requests leave to file a surreply in opposition to defendant's motion for summary judgment. Dkt. # 275. Plaintiff claims that defendant raised new arguments in its reply and she should be permitted to respond to those arguments, but she fails to specifically identify what new issues were raised in defendant's reply. Id. at 1. Defendant objects to plaintiff's request and states that it did not raise any new issues in its reply. It claims that plaintiff was looking for a way to supplement her response even before the reply was filed, and her request to file a surreply is an attempt to evade the Court's order prohibiting plaintiff from supplementing her response with additional argument. Dkt. # 278, at 1-2.

Plaintiff claims that defendant's reply contains "misstatements of fact along with new issues" and plaintiff requests an opportunity to address the alleged misstatements and new issues. If

a party raises new arguments or cites new evidence in a reply to a summary judgment motion, a district court can refuse to consider the new arguments or evidence or the district court can permit the opposing party to file a surreply. Beaird v. Seagate Technology, Inc., 145 F.3d 1159, 1164 (10th Cir. 1998). The Court has reviewed defendant's reply and finds that it does not raise any new legal or factual arguments that were not raised in defendant's motion for summary judgment. Therefore, Beaird does not require the Court to authorize plaintiff to file a surreply.

Defendant has produced evidence showing that plaintiff was looking for a way to file a surreply even before the reply was filed, in order to supplement her response. Defendant's reply was filed on March 23, 2009. On March 18, 2009, defense counsel contacted plaintiff to determine if she had an objection to defendant's request for an enlargement of the page limitation for its reply. Dkt. # 278, Ex. 1, at 3. Plaintiff had no objection "as long as defendant has no objection to my filing a surreply." Id. at 2. Defendant responded that it would be impossible to determine if a surreply was appropriate until the reply was filed. Id. at 1. Plaintiff stated that she believed defendant would be raising new issues if it needed a page extension and she noted that her "response brief itself wasn't as extensive as [she] had intended." Id. Just 20 minutes after defendant filed its reply, plaintiff asked defense counsel if there was

an objection to her request to file a surreply. Id., Ex. 3, at 1. The Court has already found that defendant's reply did not raise any new issues, and this evidence suggests that plaintiff's request to file a surreply is nothing more than an attempt to supplement her response. The Court finds that it is unnecessary for plaintiff to file a surreply, and her motion (Dkt. # 275) is denied.

C.

SWBT argues that plaintiff has not established a prima facie case of gender discrimination and she has no evidence that her termination for insubordination was pretextual. Plaintiff responds that SWBT was looking for a reason to terminate plaintiff due to her gender, and her belief that she was required to retake NEST while male employees were not subject to the same requirement is sufficient to show that the stated reason for her termination was discriminatory and pretextual.

In this case, plaintiff does not have direct evidence of discrimination and the Court must use the burden-shifting framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), to determine if plaintiff's claim of gender discrimination should be permitted to proceed to trial. Orr v. City of Albuquerque, 471 F.3d 1144, 1149 (10th Cir. 2005). To establish a prima facie case of gender discrimination, a plaintiff must prove that

she: "(1) belongs to a protected class; (2) was qualified for her position; (3) was discharged despite her qualifications; and (4) was terminated 'under circumstances which give rise to an inference of discrimination.'" Swackhammer v. Sprint/United Management Co., 493 F.3d 1160, 1167 (10th Cir. 2007). The key inquiry is whether plaintiff has shown that the adverse employment action "under circumstances giving rise to an inference of unlawful discrimination." Kendrick v. Penske Transp. Servs., Inc., 220 F.3d 1220, 1227 (10th Cir. 2000). The burden to state a prima facie case is simply a burden of production and it is not an onerous burden. Plotke v. White, 405 F.3d 1092, 1099 (10th Cir. 2005). If the plaintiff establishes a prima facie case, the burden shifts to defendant to provide a legitimate, nondiscriminatory reason for its actions. Adamson v. Multi Community Diversified Servs., Inc., 514 F.3d 1136, 1145 (10th Cir. 2008). Once the defendant has provided a legitimate, non-discriminatory explanation for its actions, the burden shifts back to the plaintiff to show that the proffered explanation is pretextual. Etsitty v. Utah Transit Authority, 502 F.3d 1215, 1225 (10th Cir. 2007).

Defendant challenges plaintiff's prima facie case on the basis that plaintiff has not produced any evidence raising an inference of discrimination. The parties do not dispute that plaintiff was a member of a protected class, was qualified for her job, and that she suffered an adverse employment consequence.

The Tenth Circuit has described a plaintiff's burden to establish a prima facie case as "so light that only the most baseless of claims fails to satisfy it." Zamora v. Elite Logistics, Inc., 478 F.3d 1160, 1171 (10th Cir. 2007). In this case, plaintiff claims that she was required to undergo pole climbing training after returning from an extended disability leave, but she believed that climbing a pole with hooks was unsafe and unnecessary. Dkt. # 255, at 11. She claims male employees were not subject to this requirement and, even though defendant has produced evidence refuting plaintiff's assertion, plaintiff claims that defendant's evidence is "tainted." Id. at 14. Plaintiff also suggests that SWBT did not hire many female CSTs, and this is further evidence of gender discrimination. For purposes of this motion only, the Court assumes that plaintiff satisfied her burden to produce some evidence creating an inference of discrimination for her prima facie case.

Defendant has provided a legitimate, non-discriminatory reason for its decision to terminate plaintiff's employment. Specifically, it states that plaintiff was fired for insubordination, because she refused to report to a required training course upon her return from an extended leave of absence. Dkt. # 222, at 15. "The defendant's burden is merely to articulate through some proof a facially nondiscriminatory reason for the termination; the defendant does not at this stage of the proceeding

need to litigate the merits of the reasoning, nor does it need to prove that the reason relied upon was bona fide, nor does it need prove that the reasoning was applied in a nondiscriminatory fashion." EEOC v. Flasher Co., Inc., 986 F.2d 1312, 1316 (10th Cir. 1992). The Tenth Circuit has described the defendant's burden at this stage of the proceedings as "exceedingly light." Zamora, 478 F.3d at 1165. Defendant's stated reason for terminating plaintiff, insubordination, is a legitimate, non-discriminatory reason explaining plaintiff's discharge, and defendant has satisfied its burden.

At this stage of the proceeding, the burden shifts to plaintiff to show that defendant's explanation for terminating plaintiff's employment is pretextual. Plotke, 405 F.3d at 1099; Salguero v. City of Clovis, 366 F.3d 1168, 1176 (10th Cir. 2004). "A plaintiff demonstrates pretext by showing either that a discriminatory reason more likely motivated the employer or that the employer's proffered explanation is unworthy of credence." Stinnett v. Safeway, Inc., 337 F.3d 1213, 1218 (10th Cir. 2003) (quoting Rea v. Martin Marietta Corp., 29 F.3d 1450, 1455 (10th Cir. 1994)). A plaintiff typically attempts to satisfy his or her burden by "revealing 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence.'" Mackenzie v. City & County

of Denver, 414 F.3d 1266, 1278 (10th Cir. 2005) (quoting Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir. 1997)). A plaintiff's "mere conjecture" that the employer's explanation is pretext is not a sufficient basis to deny a motion for summary judgment. Branson v. Price River Coal Co., 853 F.2d 786, 772 (10th Cir. 1988).

Plaintiff argues that SWBT was looking for a way to fire her and requiring her to attend NEST was excuse to expedite the termination of her employment. Dkt. # 255, at 5 ("I also knew defendant's stated reason 'safety concerns' were bologna."). She alleges that male employees were not required to re-attend NEST after returning from leave and this creates an inference of discrimination. However, plaintiff's allegations of gender discrimination are not supported by any evidence and, instead, her vague allegations of gender discrimination are directly contradicted by the evidence in the summary judgment record. Defendant has produced evidence showing that at least ten similarly situated male employees were required to re-train after returning from leave. Dkt. # 222, Ex. 2, at 4; id., Ex. 8, at 3. In fact, one of plaintiff's supervisors, James, re-attended a pole climbing class after an extended period of leave. Id., Ex. 2, at 4. Although plaintiff claims that defendant's evidence is "tainted," she provides no evidence supporting this assertion. The evidence shows that re-training was regularly required of

employees after a period of absence and that this requirement was applied in a gender-neutral manner. Plaintiff's allegation of discrimination based on a gender-biased requirement to re-take NEST is unfounded and does not create a genuine issue of material fact. Plaintiff further alleges that SWBT's hiring practices support her claim of gender discrimination, because SWBT did not frequently hire female CSTs. Dkt. # 255, at 9. This allegation is completely unsupported by any evidence. Plaintiff has not produced any payroll, human resources, or personnel records that would permit the Court to determine the gender of CSTs within Oklahoma I&R, and the Court declines to speculate about the gender of plaintiff's coworkers. There is no evidence suggesting SWBT discriminated against plaintiff on the basis of her gender, and plaintiff has not satisfied her burden to show that SWBT's reason for terminating her employment was pretextual. Thus, SWBT is entitled to summary judgment on plaintiff's claim of gender discrimination under Title VII.

D.

Plaintiff claims that defendant terminated her employment based on its mistaken perception that she was disabled due to a psychological impairment. Dkt. # 255, at 7. She also claims that defendant refused to provide her an accommodation that would

allow her to perform the physical aspects of her job.[8] Id. at 4, 6, 10. Defendant responds that there is no evidence that it perceived plaintiff as substantially limited from performing a major life activity, and plaintiff can not establish a prima facie case of disability discrimination. Dkt. # 222, at 22. Defendant also argues that plaintiff's ADA claim based on an alleged failure to accommodate was not raised in her EEOC charge and is not supported by any evidence. Id. at 28.

Plaintiff's claim of disability discrimination is based on circumstantial evidence, and the Court must apply the McDonnell Douglas framework when ruling on defendant's motion for summary judgment. MacKenzie, 414 F.3d at 1273. To establish a prima facie case of disability discrimination under the ADA, a plaintiff must show that he or she "(1) is a disabled person as defined by the ADA; (2) is qualified, with or without accommodation, to perform the essential functions of the job held or desired; and (3) suffered discrimination by an employer or prospective employer because of the disability." Justice v. Crown Cork & Seal Co., Inc., 527 F.3d 1080, 1086 (10th Cir. 2008). The ADA defines a disability as:

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[8] Plaintiff states that she may prove a "regarded as" ADA claim by showing that her employer
refused to accommodate her apparent disability. Dkt. # 255, at 17.

A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
(B) a record of such an impairment; or
(C) being regarded as having such an impairment . . . .42 U.S.C. 12102(1). Plaintiff's claim falls under subsection (C), because she asserts that SWBT perceived her as disabled. A person is perceived as disabled when "(1) a covered entity mistakenly believes that person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, non-limiting impairment substantially limits one or more major life activities." Justice, 527 F.3d at 1086 (quoting Sutton v. United Air Lines, Inc., 527 U.S. 471, 489 (1999)).

Plaintiff claims that SWBT regarded her as having a psychological impairment that substantially limited her ability to perform the major life activities of emotional stability, eating, thinking, and working. Dkt. # 222, Ex. 1, at 59. In her deposition, plaintiff stated that she is not pursuing a claim based on an actual disability and she did not provide SWBT any evidence showing that she had an actual psychological impairment. Id. at 58-59. The regulations promulgated under the ADA provide a list of activities that constitute major life activities, but this list is not exhaustive. Kellogg v. Energy Safety Servs. Inc., 544 F.3d 1121 (10th Cir. 2008) ("Although driving is not one of the listed activities

in the EEOC regulation, that does not end the inquiry because the regulation does not purport to give an exhaustive list."). The list identifies "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working" as major life activities. 29 C.F.R. § 1630.2(j). Plaintiff's claim that SWBT perceived her as substantially limited in her ability to work, if proven, would constitute a recognized major life activity under the ADA. The Tenth Circuit has construed the "caring for oneself" provision of the applicable regulation broadly, and activities such as eating, grooming, cleaning, and other general activities necessary to care for oneself fall within this category. Holt v. Grand Lake Mental Health Ctr., Inc., 443 F.3d 762, 767 (10th Cir. 2006). Although the Tenth Circuit has not determined whether eating and thinking are major life activities under the ADA, the Court finds that such activities reasonably fall within the category of "caring for oneself" and, for the purpose of ruling on defendant's motion for summary judgment, assumes that eating and thinking constitute major life activities under the ADA. However, emotional stability, by itself, is not a major life activity. See Smoke v. Wal-Mart Stores, Inc., 208 F.3d 227, 2000 WL 192806, *3 (Feb. 17, 2000) ("An ability to cope with one's emotional states

may be a necessary component of many major life activities, but it is not itself an 'activity'").[9]

The issue is whether defendant perceived plaintiff as being unable to perform a major life activity due to a psychological impairment. It is undisputed that plaintiff took short-term disability leave from August 2005 to August 2006. However, this does not establish as a matter of law that defendant perceived plaintiff as disabled, and the Court must consider the evidence, including the fact that plaintiff took disability leave, to determine if defendant perceived plaintiff as disabled at the time of her termination. See Berry v. T-Mobile USA, Inc., 490 F.3d 1211, 1219-20 (10th Cir. 2007) ("disability" is a statutory term of art and the employer's knowledge of a medical condition and a request for leave does not conclusively establish that an employer perceived an employee as disabled). The Court's focus is on the employer's subjective state of mind and plaintiff must show that her employer mistakenly believed that she was disabled. Justice, 527 F.3d at 1086.

Plaintiff argues that defendant regarded her as disabled due to a psychological impairment. She claims that her mental health began to decline after

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[9] Unpublished decisions are not precedential, but may be cited for their persuasive value. See Fed. R. App. 32.1; 10th Cir. R. 32.1.

she returned from a four month suspension in 2003, and she exhibited symptoms such as crying, irritability, and weight loss. Dkt. # 255, at 3.She relies on Ciskowski's statement during the November 17, 2006 meeting referencing her "disability" as evidence that he perceived plaintiff as disabled. Dkt. # 222, Ex. 2-H, at 2. Plaintiff denies that she discussed her medical history with SWBT after she returned to work. Id., Ex. 1, at 58. The summary judgment record shows that she repeatedly asked to return to work while she was on disability leave and represented to defendant that she was able to work in some capacity. Dkt. # 255, at 3-5. SWBT allowed plaintiff to return to work under its Transitional Work Program, which suggests that SWBT viewed any restrictions on plaintiff's ability to work as temporary. See Delgado v. Tom Kelly & Assocs., Inc., 2006 WL 3762093 (N.D. Okla. Dec. 20, 2006) (plaintiff's employer did not perceive the plaintiff as disabled from performing a major life activity, because the evidence showed that the employer viewed any impairment as temporary). By placing plaintiff in the Transitional Work Program, defendant implicitly acknowledged that plaintiff could return to work without any restrictions within 60 days. This is supported by the fact that defendant removed any restrictions on plaintiff on October 19, 2006 and asked her to resume all of the duties of a CST. Plaintiff claims that, while she was on disability leave, she told James that she may have

cancer. Dkt. # 255, at 3. However, her alleged impairments are psychological in nature, rather than physical, and she offers no argument suggesting how a potential diagnosis for an undefined type of cancer caused James to perceive her as having a psychological impairment. Considering all of the evidence, including Ciskowski's statements about plaintiff's "lengthy disability" and defendant's knowledge that plaintiff took disability leave, the Court will err on the side of caution and find that plaintiff has identified a genuine issue of material fact on the issue of defendant's perception of plaintiff as suffering from a psychological impairment. The evidence shows that plaintiff took disability leave from August 2005 to August 2006. Ciskowski made at least two references to plaintiff's "disability" during the November 17, 2006 meeting. Viewed in a light most favorable to plaintiff, these facts suggest that Ciskowski may have perceived plaintiff as having a psychological impairment, even considering the evidence defendant has produced showing that plaintiff was treated in the same manner as any other employee returning from an extended period of leave. However, this genuine issue of material fact does not preclude summary judgment, because plaintiff must still show that defendant perceived her as substantially limited from performing a major life activity based on this disability.

Plaintiff has not shown that defendant perceived her as substantially limited from performing a major life activity. To show that defendant perceived her as unable to perform a major life activity, she must produce evidence that defendant viewed her as having greater difficulty than the average person when performing the specified activity. Doyal v. Oklahoma Heart, Inc., 213 F.3d 492, 497 (10th Cir. 2000). Concerning plaintiff's allegation that defendant perceived her as unable to work, the Tenth Circuit has stated that it is "particularly difficult" for a plaintiff to prove that he or she was perceived as unable to work as defined by the ADA, and a plaintiff must show that he or she was "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities." Justice, 527 F.3d at 1086 (quoting EEOC v. Heartway Corp., 466 F.3d 1156, 1162 (10th Cir. 2006)). The evidence shows that defendant believed plaintiff could perform the essential duties of her job after October 19, 2006, and sent plaintiff for re-training to refresh her skills before returning to the field. In addition, plaintiff has not produced any evidence suggesting that defendant perceived her as unable to perform a class or broad range of jobs as compared to an average person, and she may not rely on working as a major life activity underlying her ADA claim. Likewise, plaintiff has not submitted

any evidence showing that her supervisors viewed her as unable to perform the major life activities of eating or thinking. Plaintiff states that James was aware of her weight loss based on her reference to a potential diagnosis of cancer. Dkt. # 255, at 15. She also claims that James told her to "go get healthy" and he perceived her as unable to take care of herself. Dkt. # 222, Ex. 1, at 60. However, James states that he was unaware of plaintiff's medical diagnosis and she never explained what caused her to lose weight. Id., Ex. 2, at 5. In her deposition, plaintiff acknowledged that weight loss can be caused by many conditions other than a psychological impairment. Id., Ex. 1, at 64. The Court finds that James' alleged knowledge of plaintiff's weight loss alone, without any other evidence, does not show that plaintiff was unable to perform the major life activity of eating. Plaintiff has produced no evidence that would permit the Court to find that defendant perceived her as substantially limited in her ability to think, and this asserted major life activity does not support a "regarded as" ADA claim. Plaintiff has not shown that defendant perceived her as unable to perform any major life activity, and defendant is entitled to summary judgment on plaintiff's ADA claim.

Plaintiff's final argument in support of her ADA claim is that defendant failed to accommodate her actual disability. Defendant argues that plaintiff did not exhaust her administrative remedies for a

failure to accommodate claim. "Exhaustion of administrative remedies is a jurisdictional prerequisite to suit under Title VII." Jones v. Runyon, 91 F.3d 1398, 1399 (10th Cir. 1996) (internal quotation marks and citation omitted). To exhaust administrative remedies, a plaintiff must file a timely charge of discrimination with the EEOC. See 42 U.S.C. § 2000e-5(b). The Tenth Circuit has held that "[a] plaintiff's claim in federal court is generally limited by the scope of the administrative investigation that can reasonably be expected to follow the charge of discrimination submitted to the EEOC." MacKenzie, 414 F.3d at 1274. Thus, if the EEOC could not have been reasonably expected to investigate plaintiff's failure to accommodate claim, this Court does not have jurisdiction to consider the matter. Plaintiff's EEOC charge plainly states that her claim under the ADA is based on a perceived disability. Dkt. # 222, Ex. 11-D ("I believe I have been discriminated against because . . . of being regarded as disabled, in violation of [the ADA]"). Based on the allegations of the charge, the EEOC should not have been expected to investigate a failure to accommodate claim, because such a claim is completely contradictory to plaintiff's "regarded as" ADA claim. To prove that defendant failed to accommodate a known disability, plaintiff would have to show that she suffered from a disability and requested an accommodation from defendant. See Tesh v. United States Postal Service, 349 F.3d 1270,

1275 (10th Cir. 2003) (an employee must come forward with evidence of a disability and place the employer on notice of his or her wish to be accommodated to state a failure to accommodate claim). Plaintiff has argued that defendant mistakenly perceived her as disabled and this is the basis for her ADA claim. The Court lacks jurisdiction over plaintiff's unexhausted failure to accommodate claim and will not allow plaintiff to proceed to a jury on this claim.[10]

E.

Plaintiff asserts that she was fired in retaliation for reporting gender and disability discrimination. She claims that she filed an internal

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[10] Even if the Court had jurisdiction to consider this claim, it would not be reasonable to expect defendant to accommodate her alleged disability when she repeatedly claims that defendant mistakenly viewed her as disabled and she did not suffer from a disability. She claims that she refused to attend NEST due to safety concerns, see Dkt. # 255, at 5, but she did not provide any evidence to defendant of a medical or psychological condition that would have prevented her from attending NEST. Dkt. # 222, Ex. 1, at 58; id., Ex. 2-H, at 2. Therefore, she did not provide notice of a disability or request an accommodation due to a disability, and a failure to accommodate claim would fail as a matter of law.

complaint of discrimination in 2003 and this "spawn[ed] the beginning of the end of her career." Dkt. # 255, at 9. She also claims that she made an internal complaint of gender discrimination through an SWBT hotline on October 22, 2006, and her former attorney, Jeff Nix, sent a letter to defendant on October 27, 2006 threatening to file suit under the ADA if plaintiff was fired for insubordination. Dkt. # 222, Exs. 10, 12. She alleges that defendant retaliated against her by terminating her employment. Defendant responds that neither event establishes a causal connection between protected activity and an adverse employment action, and plaintiff can not establish a prima facie case of retaliation under Title VII or the ADA. Defendant also argues that plaintiff can not show that the stated reason for her termination, insubordination, is pretextual.

Under Title VII, it is unlawful for an employer to take any adverse action against an employee for filing a charge or reporting acts of alleged workplace discrimination. 42 U.S.C. §2000e-3(a). To prove a prima facie case of retaliation, plaintiff must show that: (1) she engaged in protected opposition to discrimination; (2) her employer took an adverse employment action against her; and (3) there is a causal connection between the opposition and the adverse action. Stover v. Martinez, 382 F.3d 1064, 1071 (10th Cir. 2004). The law is clear that reporting workplace discrimination to the EEOC is protected

behavior. Anderson v. Coors Brewing Co., 181 F.3d 1171,
1178 (10th Cir. 1999); McCue v. State of Kansas, Dep't of Human Resources, 165 F.3d 784, 789
(10th Cir. 1999). An employee may establish causation by showing that the adverse employment action occurred soon after the protected activity. Annett v. University of Kansas, 371 F.3d 1233, 1239-40 (10th Cir. 2004); Burrus v. United Tel. Co. of Kansas, Inc., 683 F.2d 339, 343 (10th Cir. 1982). "Unless there is a very close temporal proximity between the protected activity and the retaliatory conduct, the plaintiff must offer additional evidence to establish causation." O'Neal v. Ferguson Constr. Co., 237 F.3d 1248, 1252 (10th Cir. 2001).

In this case, plaintiff can establish the first and second elements of a prima facie case of retaliatory discharge under Title VII or the ADA. Plaintiff has shown that she engaged in protected activity by filing an internal complaint of discrimination in 2003 challenging her four month suspension[11] and by raising allegations of gender and disability discrimination in October 2006. Plaintiff can also show that she suffered an adverse

[11] Plaintiff's 2003 complaint raised only an allegation of gender discrimination and there is no
indication that plaintiff believed her four month suspension was the result of disability
discrimination. Dkt. # 222, Ex. 1, at 30-31.

employment action, because she was fired on November 17, 2006. However, plaintiff must produce some evidence showing a causal link between her protected activity and her termination.

Plaintiff claims that she filed an internal complaint alleging that her suspension for failing to report a driving offense in 2003 was actually pretext for gender discrimination. She acknowledges that she was permitted to return to work in April 2003 and she did not file an EEOC charge based on this incident. Dkt. # 222, Ex. 1, at 37. For at least two reasons, plaintiff may not rely on her 2003 suspension as a basis for a retaliation claim. First, she has produced no evidence that either James or Ciskowski were aware of her 2003 complaint. See Petersen v. Utah Dep't of Corrections, 301 F.3d 1182, 1188 (10th Cir. 2002) ("An employer's action against an employee cannot be because of that employee's protected opposition unless the employer knows the employee has engaged in protected opposition."); Williams v. Rice, 983 F.2d 177, 181 (10th Cir. 1993) (a "plaintiff must show that the individual who took adverse action against [plaintiff] knew of the employee's protected activity" to sustain a retaliation claim). James was not plaintiff's supervisor when she made her internal complaint in 2003 and he did not learn of the complaint until he had already asked

plaintiff to re-take NEST.[12] Dkt. # 222, Ex. 2, at 6. Likewise, Ciskowski states that he was unaware of plaintiff's 2003 complaint until he had already authorized plaintiff to retrain. Id., Ex. 8, at 4. Second, plaintiff's 2003 complaint is so remote in time from plaintiff's eventual discharge in November 2006 that it can not form the basis for a retaliation claim. See Fye v. Oklahoma Corp. Comm'n, 516 F.3d 1217 (10th Cir. 2008) (period of two weeks between protected activity and termination was sufficient to establish causal connection); Haynes v. Level 3 Communications, LLC, 456 F.3d 1215, 1228 (10th Cir. 2006) (plaintiff's termination over seven months after engaging in protected activity was insufficient to prove causation for a retaliation claim). A three year lapse between plaintiff's complaint and her termination is insufficient to support a causal connection between the two events and the 2003 complaint may not be used to independently establish a prima facie case of retaliation.

Plaintiff also claims that defendant

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[12] Plaintiff states that James' fiancé worked for SWBRT and handled plaintiff's claim for unemployment benefits during plaintiff's four month suspension. Thus, she infers that James should be treated as having knowledge of her 2003 complaint. Dkt. # 255, at 15. Plaintiff cites no authority to show that this type of inference is permissible, and the Court finds that plaintiff's vague assertion is insufficient to create a genuine issue of material fact concerning James' knowledge of her 2003 complaint.

terminated her in retaliation for her October 22, 2006 internal complaint (SWBT hotline call) of gender discrimination and an October 27, 2006 letter from an attorney raising allegations of disability discrimination. Defendant responds that both of these events occurred after James directed plaintiff to report to NEST for retraining, and neither event may be used to support a retaliation claim. On October 19, 2006, Johnson informed plaintiff that she was required to report for NEST on the following Monday, October 23, 2006. Dkt. # 222, Ex. 2, at 3-4; Dkt. # 255, at 5. Plaintiff called in sick the following day, October 20, 2006, and notified Ciscowski of her concerns about the dangers of NEST. Dkt. # 222, Ex. 1, at 54. On October 23, 2006, plaintiff did not report for training and James called a meeting with plaintiff and her union steward to discuss plaintiff's failure to attend NEST. Id., Ex. 2, at 4. James suspended plaintiff on October 23, 2006 and began preparing a termination proposal on October 24, 2006. Dkt. # 222, Ex. 2, at 4. James states that he did not receive notice of plaintiff's internal complaint (SWBT hotline call) until November 8, 2006, and he did not learn of the letter from her attorney until November 13, 2006. Id. at 5.

Based on the timing of plaintiff's October 22, 2006 hotline call and her attorney's October 27, 2006 letter, the Court finds that plaintiff has produced enough evidence to show a causal connection between her protected activity and her termination.

See Fye, 516 F.3d at 1228 (close temporal proximity between protected activity and adverse employment action is sufficient to show causal connection). As the Court has noted, defendant has stated a legitimate non-discriminatory reason for plaintiff's termination and the burden shifts to plaintiff to show that this reason was pretextual.

Plaintiff has not shown that defendant's stated reason for terminating plaintiff was pretextual. The evidence shows that James ordered plaintiff to attend NEST before she engaged in any protected activity raising allegations of gender or disability discrimination in 2006, and it would not be reasonable to infer that James directed plaintiff to attend NEST in retaliation for any protected activity. In addition, he was not aware of plaintiff's allegations of gender or disability discrimination when he recommended her discharge. Defendant's reason for terminating plaintiff's employment has remained constant, and there is no evidence suggesting any "weaknesses, implausibilities, inconsistencies, incoherencies" in defendant's legitimate, non-discriminatory explanation. Mackenzie, 414 F.3d 1266. The evidence shows that plaintiff was required to attend NEST after returning from leave in the same manner as any other SWBT employee, regardless of her gender or any perceived disability. The record is clear that plaintiff personally believed climbing a pole with hooks with dangerous and she objected to any

further training on this skill. However, SWBT has submitted evidence that pole climbing was an essential job requirement and retesting of this skill was required equally of all employees returning from an extended period of leave. Plaintiff has not demonstrated that a genuine issue of fact exists that would cast doubt on defendant's stated reason for firing her, and she can not show that her termination for insubordination was pretextual. Therefore, summary judgment should be granted in favor of defendant on plaintiff's retaliation claims under Title VII and the ADA.

IT IS THEREFORE ORDERED that Defendant's Motion for Summary Judgment and Brief in Support Thereof (Dkt. ## 222, 228) is **granted**. A separate judgment is entered herewith.

IT IS FURTHER ORDERED that Plaintiff's Motion for Relief Pursuant to Federal Rules of Civil Procedure 60(b)(1), (2), (6) and Brief in Support (Dkt. # 223); Plaintiff's Motion for District Court Judge to Review Magistrate's Rulings (Dkt. # 271); and Plaintiff's Motion to File a Surreply to Defendant's Reply in Support of It's Summary Judgment Motion and Request for an Expedited Ruling (Dkt. # 275) are **denied**.

IT IS FURTHER ORDERED that all other motions (Dkt. ## 253, 285, 293) are **moot**. All deadlines and scheduled dates are hereby **stricken**.

DATED this 6th day of April, 2009.

s/Claire V. Eagan
Claire V. Eagan, Chief Judge
United Sates District Court
For the Northern Dist. of Ok.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

TONIA E. FISHER,
Plaintiff,

Case No.
07-CV-0433-CVE-FHM

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,
Defendant.

OPINION AND ORDER

Now before the Court is Plaintiff's Motion to Alter/Amend Judgment per FRCP 59(e) and Amend Findings Pursuant to FRCP 52(b) (Dkt. # 306). Plaintiff asks the Court to reconsider its opinion and order (Dkt. # 296) granting defendant's motion for summary judgment.

I.

Plaintiff Tonia E. Fisher was hired by Southwestern Bell Telephone Company (SWBT) in 1997 as a systems technician and, in 1999, applied for and was approved for a transfer to a position as a customer service technician (CST) in SWBT's Oklahoma Installation and Repair Organization.[1]

[1] The factual background provided in this Opinion and Order is a brief summary of the events

According to SWBT documents, one of the essential requirements of plaintiff's new position was the ability to climb a pole with hooks or gaffs. In 2002, SWBT suspended plaintiff without pay for four months, because she failed to immediately report an alcohol-related driving offense that occurred outside of work. Plaintiff subsequently filed an internal grievance asserting that she was the victim of gender discrimination, because similarly-situated male-employees were not suspended under the same disciplinary policy. Plaintiff took paid disability leave from August 2005 to August 2006. On August 21, 2006, she returned to work after her physician lifted some of her work restrictions, but she initially was assigned to a temporary position as part of SWBT's Transitional Work Program. Plaintiff's physician cleared her to return to work without any restrictions on October 19, 2006, and she resumed her duties as a CST the same day.

SWBT's Area Manager, Curtis James, learned that plaintiff had not climbed a pole with hooks or gaffs for some time and she did not even have a set of hooks. James believed this was a necessary skill for any CST, and he directed plaintiff

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giving rise to plaintiff's claims. A complete recitation of the facts is contained in the Court's
April 6, 2009 opinion and order granting defendant's motion for summary judgment. See
Dkt. # 296, at 2-11.

to attend a two-week New Employee Safety Training (NEST) course in Oklahoma City. Plaintiff learned of this requirement on October 19, 2006, and NEST was set to begin on October 23, 2006. Plaintiff notified her direct supervisor, Tareena Johnson, that she believed NEST was unsafe, and she wanted to know if passing NEST was a condition of her continued employment. Johnson initiated a phone call to James with plaintiff present, and James informed plaintiff that attending NEST was required to maintain her employment with SWBT. He stated that she might be allowed to re-take the class if she failed. Plaintiff did not attend work on Friday, October 20, 2006. On Sunday, October 22, 2006, the day before she was supposed to attend NEST, plaintiff called an SWBT hotline and threatened to file a claim of disability discrimination with the Equal Employment Opportunity Commission.

Plaintiff failed to report to NEST on October 23, 2006, and James held a meeting that day to discuss plaintiff's conduct. At the meeting, plaintiff claimed that she was victim of gender and disability discrimination, but she did not provide a medical excuse for her failure to attend NEST. James suspended plaintiff without pay for insubordination and initiated termination procedures on October 24, 2009. James and his supervisor, Charles Ciskowski, held a "day in court" meeting with plaintiff on November 17, 2006, and asked plaintiff to submit any evidence or present arguments concerning her

refusal to attend NEST. Plaintiff re-asserted that she was the victim of gender and disability discrimination, but offered no medical reason why she could not attend NEST. Plaintiff was officially fired by SWBT on November 17, 2006. On December 5, 2006, plaintiff filed a charge with the EEOC alleging claims of gender and disability discrimination. Dkt. # 222, Ex. 11-C. She had submitted a general intake questionnaire asserting that she was fired in retaliation for reporting gender and disability discrimination, but no retaliation claim was alleged in the charge. Plaintiff received a right-to-sue letter from the EEOC and, on August 8, 2007, filed this lawsuit alleging gender discrimination, disability discrimination, and retaliation. Dkt. # 2. She filed an amended complaint with additional factual allegations on January 18, 2008, but she did not add any new claims or parties. Dkt. # 9. On February 21, 2008, Plaintiff filed a second amended complaint naming her employer, SWBT, as the defendant. Dkt. # 25. The Court dismissed plaintiff's retaliation claims and any gender discrimination claim based on events occurring in 2003 due to plaintiff's failure to exhaust her administrative remedies as to these claims. Dkt. # 55.

The EEOC subsequently issued an amended charge asserting a retaliation claim against defendant. Dkt. # 72, Ex. 1. Plaintiff produced evidence showing that she alleged facts supporting

a retaliation claim in her general intake questionnaire, but the EEOC inadvertently omitted a retaliation claim from her original charge. Thereafter, in this Court, plaintiff requested leave to file an amended complaint asserting a retaliation claim and state law claims for wrongful discharge in violation of Oklahoma's public policy. Dkt. # 79. The Court granted plaintiff leave to file a third amended complaint asserting a retaliation claim in addition to her other federal discrimination claims, but found that plaintiff delayed when seeking leave to amend to add state law claims. Dkt. # 133. Plaintiff filed a third amended complaint on October 28, 2008. Dkt. # 136.

SWBT filed a sealed motion for summary judgment (Dkt. # 222) on February 10, 2009. The next day, plaintiff filed a motion asking the Court to reconsider its partial denial of her motion to amend. Dkt. # 223. Plaintiff also filed a motion asking the Court to review every discovery order entered by a magistrate judge.[2]Dkt. # 271. On April 6, 2009, the Court entered zn opinion and order Dkt. # 296) granting SWBT's motion for summary judgment and denying plaintiff's motions. Judgment was entered

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[2] At various times, this case was assigned to three different magistrate judges – former
Magistrate Judge Sam A. Joyner, Magistrate Judge T. Lane Wilson, and Magistrate Judge
Frank H. McCarthy.

on the same day. Plaintiff filed a notice of appeal on April 7, 2009. Dkt. #298. On April 20, 2009, plaintiff filed a motion seeking reconsideration of the Court's opinion and order. Dkt. # 306. The Tenth Circuit Court of Appeals has notified this Court that plaintiff's appeal is abated, because plaintiff has filed a timely post-trial motion under Fed. R. Civ. P. 59(e). Dkt. #308.

II.

Plaintiff requests relief from judgment under Fed. R. Civ. P. 52(b) and 59(e). Rule 52(b) applies to findings of fact and conclusions of law entered after a non-jury trial, and this rule is inapplicable to judgments entered under Fed. R. Civ. P. 56. Orem v. Rephann, 523 F.3d 442, 451 n.2 (4th Cir. 2008) (Shedd. J., concurring) ("Rule 52(b) is a trial rule that is not applicable in a summary judgment proceeding"); Silva v. Potter, 2006 WL 3219232 (M.D. Fla. Nov. 6, 2006) ("a Rule 52(b) motion to amend judgment is improper where the district court enters an order on a motion for summary judgment because the findings of fact on a summary judgment motion 'are not findings of fact in the strict sense that the trial court has weighed evidence and resolved disputed
factual issues'"); Buck v. Libous, 2005 WL 2033491 (N.D.N.Y. Aug. 17, 2005) ("Since a court engages in no fact-finding when it decides a summary judgment motion, a party may not use a Rule 52(b) motion to

seek reconsideration of such a decision."). However, plaintiff also relies Rule 59(e), and this rule does permit a party to request reconsideration of a final order or judgment.

Plaintiff's motion was filed with within 10 days of entry of judgment and it was timely under Rule 59(e). Adams v. Reliance Standard Life Ins. Co., 225 F.3d 1179, 1186 n.5 (10th Cir. 2000). Under Rule 59(e), a party may ask a district court to reconsider a summary judgment ruling when the district court has "misapprehended the facts, a party's position, or the controlling law." Barber ex rel. Barber v. Colorado Dept. of Revenue, 562 F.3d 1222, 1228 (10th Cir. 2009). "Grounds warranting a motion to reconsider include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." Servants of Paraclete v. Does, 204 F.3d 1005, 1012 (10th Cir. 2000). Reconsideration is "not available to allow a party to reargue an issue previously addressed by the court when the re-argument merely advances new arguments or supporting facts which were available for presentation at the time of the original argument." FDIC v. United Pacific Ins. Co., 152 F.3d 1266, 1272 (10th Cir. 1998) (quoting Cashner v. Freedom Stores, Inc., 98 F.3d 572, 577 (10th Cir. 1996)).

III.

Plaintiff asks the Court to vacate its opinion and order granting defendant's motion for summary judgment, because the Court misapprehended her arguments and the controlling law.[3] Dkt. # 313, at 2. Construing plaintiff's motion broadly, it appears that she is asserting six arguments in her Rule 59(e) motion: (1) the Court violated Fed. R. Civ. P. 56 by failing to consider the evidence in a light most favorable to plaintiff; (2) plaintiff established a genuine issue material fact as to pretext on her gender and disability discrimination claims; (3) SWBT perceived plaintiff as unable to perform the major life activity of working; (4) the Court misconstrued plaintiff's argument that SWBT failed to accommodate her alleged disability; (5) plaintiff's due process rights were violated by the magistrate judges' orders denying her motions to compel; and (6) the Court should have granted her motion to reconsider the Court's opinion and order (Dkt. # 133) partially denying her motion to amend. Dkt. # 311, at 2-7.

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[3] The Court notes that neither plaintiff's motion (Dkt. # 311) nor her reply (Dkt. # 313) contains a single citation to the Court's opinion and order or the summary judgment record, and this has made review of plaintiff's motion to reconsider difficult. The Court has searched the record to find the evidence referenced by plaintiff in her motion and will cite that evidence whenever possible. However, plaintiff may not complain that the Court failed to consider all of her arguments or evidence when she failed to provide adequate citations to the record.

Plaintiff references three statements in the Court's April 6, 2009 opinion and order (Dkt. # 296) and claims that the Court failed to view the evidence in a light most favorable to plaintiff. Dkt. # 306, at 2. She quotes the following passages from the opinion and order:

> • Fisher received treatment from a physician during her disability leave and, due to work-restrictions recommended by her physician, did not return to work until August 2006. Dkt. # 296, at 4.
>
> • Based on Fisher's return to work from a lengthy absence and her admission that she did not have hooks, James was concerned that Fisher had not used certain skills for some time and he recommended that Fisher attend a two-week NEST course . . . . Id. at 5.
>
> • James states that it was not unusual to require an employee returning from a long period of absence to re-attend NEST and recalled another CST, Orvel Merryman, a male, that he required to re-attend NEST as a condition of continued employment. Id.

Each statement in the Court's opinion and order was supported by a citation to evidence in the summary judgment record and accurately reflects the cited evidence. The Court has reviewed the underlying

evidence and finds that it did not improperly construe evidence in defendant's favor.[4] Plaintiff

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[4] Plaintiff's chief complaint seems to be that the Court did not specifically address her assertion that SWBT denied her request to return to work in February 2006, and she claims that this fact supports her argument that SWBT perceived her as disabled. She claims that SWBT was required to allow her to return to work in February 2006 under the Transitional Work Program if she could work with limited restrictions. Plaintiff fails to point out that she would be permitted to return to work under the Transitional Work Program only if her doctor certified that she could return to full duty within 30 to 60 days. Dkt. # 255-12, at 1 (e-mail chain discussing plaintiff's request to return to work in July 2006 and rejecting her request without certification from her physician). Plaintiff's statement that her physician cleared her to return to work with some restrictions does not, by itself, show that plaintiff should have been allowed to participate in the Transitional Work Program beginning in February 2006. Thus, plaintiff's statement that SWBT refused to allow her to return to work in February 2006 does not support her argument that SWBT discriminated against her due to a perceived disability, because this statement alone does not show that plaintiff was entitled to return to work.

also asks the Court to disregard James' "self-serving affidavit," because he lacks credibility and would not be believed by a jury. Dkt. # 306, at 2. However, the Court may not engage in credibility determinations or weigh the evidence when reviewing a motion for summary judgment. Seamons v. Snow, 206 F.3d 1021, 1026 (10th Cir. 2000) ("It is axiomatic that a judge may not evaluate the credibility of witnesses in deciding a motion for summary judgment."). Plaintiff has not shown that the Court improperly applied Rule 56 and summary judgment will not be reconsidered on this basis.

Plaintiff claims that similarly-situated male employees were not required to re-attend NEST and this supports her argument that defendant's stated reason for firing her was pretextual. Dkt. # 306, at 2-3. Plaintiff cites the deposition testimony of David Ratcliff. Ratcliff states that SWBT adopted a new technique for pole-climbing in 2007, and this implies that SWBT waited until plaintiff had been fired before switching to a new, safer method of pole climbing. Dkt. # 255-3, at 1-3. It is not clear why plaintiff believes that this evidence creates an inference that SWBT's stated reason for terminating plaintiff, insubordination, is pretext for gender or disability discrimination. SWBT produced evidence that similarly-situated male employees were required to re-train for pole climbing after returning

to work from a lengthy absence. See Dkt. # 222, Ex. 2, at 4; id., Ex. 8, at 3. This shows that plaintiff was treated the same as similarly-situated male employees. This also supports an inference that SWBT did not regard plaintiff as disabled, because SWBT did not treat her differently than any other employee due to a perceived disability. Plaintiff has not offered any new argument or evidence tending to show that defendant's stated reason for firing her was pretextual, and reconsideration of this issue is not appropriate under Rule 59(e). Servants of the Paraclete, 204 F.3d at 1012 (in a Rule 59(e) motion, a party may not attempt to "revisit issues already addressed or advance arguments that could have been raised in prior briefing").

Plaintiff asserts that the Court erred by finding that SWBT did not perceive her as unable to perform a major life activity. Dkt. # 306, at 3. Plaintiff claims that she produced evidence showing that SWBT refused to allow her to return from disability leave in February 2006[5] and this suggests that SWBT viewed her as unable to work. To establish that SWBT perceived her as unable to

[5] However, the summary judgment record contains a doctor's note stating that plaintiff was cleared to return to work without restrictions as of October 19, 2006. See Dkt. # 222, Ex. 5.

perform the major life activity of working, plaintiff must produce evidence showing that SWBT viewed her as unable to perform a broad range of jobs. Justice v. Crown Cork & Seal Co., Inc., 527 F.3d 1080, 1086 (10th Cir. 2008). Even if plaintiff's assertion that she was cleared to return to work in February 2006 is true, this does not show that SWBT viewed her as disabled under the ADA. SWBT produced evidence establishing that plaintiff had returned to work without restrictions on October 19, 2006 and was directed to attend NEST due to safety concerns. The evidence showed that SWBT treated plaintiff as it would any other employee returned from extended leave, and there is no evidence creating an inference that SWBT viewed plaintiff as unable to perform her job or a broad range of jobs. Plaintiff claims that the Court should have considered her argument that SWBT failed to accommodate her perceived disability. See Kelly v. Metallics West, Inc., 410 F.3d 670, 676 (10th Cir. 2005). However, the Court has already determined that plaintiff did not exhaust her administrative remedies for a failure-to-accommodate claim, and it lacks jurisdiction over this claim. Dkt. # 296, at 29. Plaintiff offers no reasonable argument challenging this conclusion and the Court will not reconsider its decision to grant summary judgment on this issue. Even if the Court were to consider plaintiff's allegations that SWBT failed to offer plaintiff an accommodation from NEST, plaintiff's claim would

still fail because she has not shown that SWBT perceived her as disabled. Kelly, 410 F.3d at 676 (plaintiff may proceed with a failure to accommodate claim based on a perceived disability if the plaintiff can establish that the employer actually perceived the plaintiff as disabled).

Plaintiff argues that the Court erred by denying her appeal of the magistrate judges' orders(Dkt. # 271) and her motion to reconsider the Court's partial denial of her motion to amend (Dkt. # 223). The arguments raised in plaintiff's Rule 59(e) motion were fully addressed in the Court's opinion and order (Dkt. # 296), and do not provide a basis for reconsideration. In an errata (Dkt.# 314), plaintiff also argues that the Court incorrectly stated that plaintiff's motion to reconsider was filed after defendant's motion for summary judgment. See Dkt. # 296, at 12. The Court's statement was correct. Defendant's motion for summary judgment (Dkt. # 222) was filed on February 10, 2009, and plaintiff's motion to reconsider (Dkt. # 223) was filed on February 11, 2009. Even if the Court were to assume that plaintiff had not received a copy of defendant's sealed motion for summary judgment by February 11, 2009, this would not affect the Court's ruling on her February 11, 2009 motion to reconsider.

IT IS THEREFORE ORDERED that Plaintiff's Motion to Alter/Amend Judgment per FRCP 59(e) and Amend Findings Pursuant to FRCP

59(e) and Amend Findings Pursuant to FRCP52(b) (Dkt. # 306) is **denied**.

IT IS FURTHER ORDERED that the Court Clerk is directed to send a copy of this Opinion and Order to the Tenth Circuit Court of Appeals in reference to Appeal No. 09-5046.

DATED this 1st day of June, 2009.

s/Claire V. Eagan
Claire V. Eagan, Chief Judge
United States District Court
for the Northern District of Ok.

APPENDIX

42USC2000e-2.

Unlawful Employment Practices

42USC2000e-2(a): Employer practices:

It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals race, color, religion, sex, or national origin.

42USC2000e-2(m)

Impermissible considerations of race color, religion, sex, or national origin in employment practices :

Except as otherwise provided in this sub-chapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42USC2000e-3

Other unlawful employment practices:

(a)Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, ...because he has opposed any practice made an unlawful employment practice by this subchapter, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

The Americans with Disabilities Act

42USC12112 (a) General Rule*

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42USC12101-* Definitions:

The term 'disability' means, with respect to an individual (i) a physical or mental impairment that

substantially limits one or more major life activities of such individual. (ii) a record of such an impairment; or (iii) being regarded as having such an impairment.

42USC12101- * Findings and Purpose:

The Congress finds that

(1) some 43,000,000 Americans have one or more physical or mental impairments and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious problem.;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal resources to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subject to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of the individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living,

and economic self sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependence and non productivity.

(b) Purpose:

It is the purpose of this chapter

(1) to provide a clean and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in

order to address the major areas of discrimination faced day-to-day by people with disabilities.

42USC12203*

Prohibitions against retaliation and coercion

(a) Retaliation

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any matter in an investigation, proceeding, or hearing under this chapter.

*pre-amendments acts

APPENDIX

No. 10-275

IN THE
Supreme Court of the United States

TONIA E. FISHER,
Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT APPENDIX

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December 13, 2010

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FOR THE NORTHERN DISTRICT OF OKLAHOMA

TONIA E. FISHER Plaintiff, v. SOUTHWESTERN BELL TELEPHONE COMPANY; (a Foreign For Profit Business Corporation)	CASE NO.: 07-CV-433-CVE-FHM FEDERAL QUESTION JURY TRIAL DEMANDED

AFFIDAVIT OF TONIA E. FISHER

I, Tonia E. Fisher, of lawful age and being first duly sworn upon oath state as follows:

Statements referring to events prior to the claims in this lawsuit are for relevant background information. This foundation is necessary in viewing the totality of the circumstances.

1. I submit this affidavit in support of plaintiff's Response In Opposition to defendant's Motion For Summary Judgment.

2. The statements contained herein are from my personal knowledge and experiences.

3. I began employment with the defendant, Southwestern Bell Telephone Company, under the title of Systems Technician in June of 1997. I was assigned to the Construction/Engineering group as a splicer. I was required, as a condition of employment (after

having been hired), to pass additional tests relating to the Systems Technician title. I successfully completed these tests.

4. I remained in the Construction dpt. for approximately two(2) years working under two(2)different supervisors. For safety reasons, I utilized a ladder while performing aerial work, and never one time climbed a pole with gaffs(hooks). I successfully performed my job duties.

5. In October of 1999 I applied and was approved for a transfer to the Installtion/Repair dpt. in Owasso, Oklahoma. I was the only female technician on the crew and one of few within very the metropolitan Tulsa area. From Oct. 1999 through Nov. 2006, I worked under six(6) different supervisors at various times. My first supervisor in Installation/Repair, Mr. Gary Hicks, told me if there were ever a time I needed a bucket truck to call a fellow co-worker who was assigned such. Over the course of seven(7) years, there were only a handful of times when this was necessary. I was fortunate enough to work with gentlemen who believed in teamwork and this was a win/win situation. I never one time climbed a pole with gaffs while performing my job duties. The majority of my work time was spent in the Owasso area, however, at times I also was 'loaned' to other areas. I was always able to utilize a ladder when aerial work was necessary. I found the ladder to be the safest and therefore the best method to access non-stepped poles. Also I knew from my experience in the 1997 NEST course of the real possibility of what is referred to as 'cutting out' on a pole. 'Cutting out' occurs when the gaff is not inserted at the precise angle to the pole. This exact thing happened during my final testing in the

1997 NEST course at eighteen feet in the air. By the grace of God I was able to quickly catch myself without 'burning the pole'. The term 'burning the pole' is common among outside technicians and refers to your body literally getting burned by the pole as you fall down. This is in addition to being impaled with splinters of varying sizes up to inches. Of course another logical consequence of 'cutting out' is the injuries received from the fall itself. Due to my experience at the NEST course, I considered whether this was even something I wanted to do for a living. I was reassured by other technicians at the class that all I had to do was pass the course; it was more like a 'right of passage' and that in the real world I would probably never have to climb with the gaffs. My actual working experience over the course of the next nine(9) years proved this to be true. In the Owasso area, aerial work was limited to less than ten percent of all jobs. As in the Construction dpt., I utilized a ladder to access aerial lines. I found this to be the safest means to accomplish the end result; customer service.

6. My appraisals for the years 97-2001 all reflected meeting expectations. In 2001 my rating was even exceeding expectations. Appraisals were given each year for ratings in the previous year. For example, my appraisal for the year 2002 was actually given in the spring of 2003.

7. In late 2002 I was suspended without pay for approximately four(4) months. The stated reason by the company was that an 'investigation' would be conducted and also, that I had not **immediately** reported an off the job driving impairment charge. I at all times maintained a valid driver's license. My license was never suspended nor revoked, and my

DMV record at that time and at all times since has zero points.

8. I was unaware, as explained at the time, that I had a duty to immediately report such. To date, the defendant has produced no evidence showing I was made aware of this requirement.

9. During the four(4) month unpaid suspension, after being informed by a 30+ year veteran of the company that a male SBC OKLAHOMA PRESIDENT had received the same charge in addition to carrying a loaded firearm and was not suspended, but rather subsequently promoted, I filed an internal EEO complaint. At the time of the unpaid suspension, I was a single parent with my sole source of income being my employment.

10. In early Spring 2003 a meeting between myself, human resource manager Betty Hondronastas, human resource manager Randy Frevert, and union representatives was held. It was during this meeting that the union and I explicitly communicated gender discrimination.

11. Subsequent to this meeting, as a condition of continued employment (and coerced under duress), I was required to sign an agreement wherein I was required to drop the pending OESC appeal, forfeit all back pay, go to mandatory EAP meetings with a company selected provider, and be subjected to random drug and alcohol testing for two(2) years in exchange for my returning to work to earn a paycheck. I have never taken drugs in my life except medications prescribed by an M.D. for a certain period of time. Further, I do not have a drinking problem and it was never suspected that I did.

[See Exhibit #7, Ciskowski deposition pg. 20 line 6

thru pg. 22 Line 3]
The random testing was just a means harassment and singling me out **after** the EEO complaint. I was a single parent at the time, my bills were piling up and I already had been without an income for four months.
12. Upon my return to work in April 2003, the beginning of the end of my career ensued. On my first day back to work I was immediately presented with my performance appraisal for The year 2002. It listed attendance and safety as unsatisfactory. Prior to the four(4) month un-paid suspension, I had never missed a days work in over five and one-half years. Likewise, I had no on the job safety deviations.
13. I refused to sign the appraisal and stated "it will never fly". The union initiated a grievance on my behalf.
14. From my return to work in 2003 through my termination in 2006 I was scrutinized and targeted for termination. My mental health began a steady decline manifesting itself in physical symptoms such as crying, irritability, and a clearly noticeable substantial weight loss.
15. During the time period Apr. 2003 - Aug. 2005 I was under a tremendous amount of stress due to on and off the job happenings. One of the greatest negative stressors that exists is for ones very livelihood to be jeopardized.
16. Climbing a pole with gaffs was never a necessary part of my job duties which I performed successfully; even exceeding expectations prior to the EEO complaint. Management was never 'concerned' enough about gaff climbing to make the required observations [see exhibit #1, PL'S DOC PROD 34] or

to provide the recertification training per their own work-safe policy [see exhibit # 1 a.].

17. In Aug. 2005 my coping abilities had deteriorated to the point I was not well at all. At my area manager's (Mr. Curtis James) recommendation, I took short term disability leave.

18. I was extremely concerned that the company "was going to try and find a way to get rid of me" and communicated such to Mr. James shortly after beginning the disability leave. As communicated, this feeling was due to the prior experiences for the previous two and one-half years. I did not want my illness to be used against me. Initially Mr. James told me to not worry and just go get healthy and the company would work with me upon my return. He even mentioned a window of time after I returned that the company would understand I would not be 100%. Later, in a different phone call Mr. James informed me I may have to be retested on some things upon my return to work. I interpreted this as red flags and asked him if he were referring to pole climbing [pool climbing school is known to be difficult, even dangerous]. I further stated I was qualified for my job. Mr. James said he would have to get back with me. When I did not hear back from him, I again contacted him and was assured I was qualified and would not have to be retested.

19. In a later phone conversation with Mr. James while the disability leave I communicated to him that I thought perhaps the doctor's suspected I had cancer (due to the weight loss and consistent diarrhea I was experiencing at the time). A later colonoscopy and upper GI test revealed no cancer.

20. I was aware from my time with the company that any disability leave was frowned upon. As such, I requested a leave of absence. Although the short term disability is a paid leave, I preferred an unpaid leave to avoid the appearance of 'milking the benefit' [I nor my doctors knew the duration I would be off work], and also to avoid discipline upon my return for 'attendance'.
21. On multiple occasions I was denied a leave of absence being told that "it doesn't apply in this situation". I was never informed of my right per company policy to appeal that determination.
22. After being initially being denied the leave of absence, I requested to return to work; "is there anything I can do?". I was informed by Mr. James that I could not transfer while on a disability leave even though I was merely requesting to return to work doing anything. I was not seeking a formal transfer.
23. In Feb. 2006 my doctor issued a RTW release with physical restrictions. The defendant refused to allow me to return with an accommodation, not even asking how long the restrictions were anticipated to last [see exhibit #2, SWBT 0119].
24. After the denial of accommodations for my return to work in Feb. 06, defendant at a later date finally agreed to such, however, initially stating for a max. of thirty (30) days (again, against their own transitional work policy). Defendant later increased the time to a max. of sixty (60) days.
25. I communicated my concern over losing my job to my doctor and the defendant's refusal to accommodate longer than sixty (60) days. My doctor agreed to limit the restrictions to the defendants demands.
26. I was informed by my disability case worker, Kaydra Fleming, that I should be allowed to take a

leave of absence; this was due to both her and her supervisors understanding [see exhibit #3, PL"S DOC PROD 0022-0025].

27. Upon my return to work in Aug. 2006, I was assigned phone work following up customer satisfaction and whether or not the technician had followed proper procedure and kept the customer informed throughout the work process. I was allowed in the field for part of one day to do inspections for my supervisor. I never rode with other technicians or was allowed to return to my technical position.

28. On the afternoon of 19 Oct 06 I was told by my supervisor, Ms. Johnson (at that time), that on the following Monday 23 Oct 06, I would ride with another technician; presumably to get acclimated back to the field environment. I was also told I would be required to demonstrate handling a ladder and at a later point, about a week, I would be expected to demonstrate pole
climbing. This was not a big concern because even though I did not climb with gaffs the job, I knew I could demonstrate such as I similarly did before in 2004 at a 'rodeo'; the only other time in nine (9) years the defendant requested such. I further informed my supervisor that I would need a pair of gaffs as mine had been gone for years. It was not unusual for other technicians to procure items from another truck... this happened often with tools.

29. I had previously informed my former supervisor, Jess Storie that I had no gaffs in 2004 at the rodeo demonstration. He told me he would order some and I never heard any more about it.

30. At the end of the day on 19 Oct 06, I was informed by Ms. Johnson that the following Monday, 23 Oct 06, I was required to report to OKC for the

NEST course. Having been through NEST before, I knew the vigorous and physical strength needed which was much more extensive than my regular job duties. Because of my prior fears ("trying to find a way to get rid of me"), I became visibly upset and requested to speak with Mr. James.

31. Ms. Johnson initiated a call to Mr. James on my behalf whereby I asked "what happens if I don't pass?". I was specifically told by Mr. James "you might be given another chance", I also asked if the NEST requirement was a condition of employment. Mr. James stated he would have to get back with us. I waited forty-five minutes past my scheduled time off for Mr. James to call back which he never did. I informed Ms. Johnson that when he called to please have him call me on my cell phone and that I was going home.

32. 19 Oct 06 fell on a Thursday. I never received a call back from Mr. James that evening and was literally up all night long sick to my stomach. My fears were more than a nightmare, I realized they were a reality.

33. Approximately 7 a.m. the next morning I phoned Ms. Johnson and explained that Mr. James had never called and I had been up all night sick. I again requested a return call. That afternoon I received a call with both Ms. Johnson and Mr. James on the line. Mr. James stated that the NEST requirement was a condition of employment and that it would be considered an act of 'insubordination' if I did not attend. It was apparent to me that at that point it didn't matter whether I went or not, termination was inevitable. The defendant had orchestrated quite a paper trail in the two plus years since my EEO complaint. Prior to the EEO complaint, with

six different supervisors over six years there was minimal web ad documentation (paper trail). One of the web ads referenced a call from the Regional vice-president of complex sales, complimenting my service at her personal residence. It was stated 'if all technicians were like Toni no one would ever leave SWB. The negative web ads began **after** the EEO complaint.

34. Later that day, 20 Oct 06, I phoned the area Director Mr. Charles Ciskowski. It was in that phone call I explained to him my safety concerns, which were real. I further communicated that I would fight all the way if I got terminated over such. Mr. Ciskowski told me he would speak with Mr. James and if "anything changes we'll let you know".

35. I spent the entire week-end replaying scenarios of the past few years in mind. From the internal EEO complaint forward nothing was ever the same. Now the defendant was requiring, as a condition of employment, something that would likely have resulted in injury. There was no question as to the discrimination and retaliatory intent and I made a decision to stand up for myself. All I wanted was to return to work and be left alone. To be permitted to perform job in the same manner I had for the previous nine years; accomplishing the mission of customer service. I also knew defendant's stated reason 'safety concerns' were bologna. It was the plaintiff herself who first expressed genuine safety concerns. Further, the defendant had for the prior nine years not followed their own work-safe plan for certain safety training; to include refresher training requirements [see exhibit #4].

36. Monday morning 23 Oct 06, I called Ms. Johnson and told her I had not gone to NEST and asked

if I was to report in. At first Ms. Johnson stated "we have no more transitional work for you". About five minutes later she called back and told me to report to the Owasso Central Office.

37. Upon my arrival at the Owasso office I was met by union steward Bob Martin. Mr. James and Ms. Johnson arrived and what was termed an 'investigatory meeting' was held [see Exhibit #4]. My parents had previously advised me to protect myself and record things when they became aware of the defendant refusing to allow me to return to work with accommoda-

tions. For this reason, and because Mr. James had already lied to me, I recorded the meeting with an audiotape. I figured that way there could be no question as to what was actually said. I explained why I did not go to NEST, that it was discrimination, harassment, and I was going to fight it. I was suspended without pay shortly thereafter "pending further investigation".

38. In the interim four weeks before my termination, I filed a second internal EEO complaint.

39. On 17 Nov 06 what was referred to as "A DAY IN COURT" meeting was held. Five to ten minutes before the meeting began I received a phone call stating the EEO investigation did not substantiate my complaint. As I expressed then to the caller, I was not surprised and was going to an outside agency (EEOC) for help. Myself, Two (2) union reps., Mr. Ciskowski, and Mr. James were present. Mr. Ciskowski opened by stating "if there are any recording devices they needed to be turned off now". He also stated that the background of the NEST requirement was **"your lengthy disability'.** This was disturbing in more ways than one. The defendant would not

allowed me to return to work when I was initially released with restrictions rather I had to wait an additional six (6) months before they finally agreed to such. I was informed this was not a time to argue the case. I reiterated what they had done and what they were continuing to do was illegal, against Federal Law, and that AT&T and their management would be held accountable. At all times while communicating my position, although very upset and angry, I remained respectful and professional.

40. It was my understanding I was terminated effective immediately.

41. After the termination in pursuing remedies per the collective bargaining agreement, the defendant did not cooperate with the grievance process in producing all requested documentation until a National Labor Relations Board charge was filed by the union. [see exhibit #5]. The defendant later produced the name of one male technician who had been required to re-attend NEST as a condition of employment. This technician had returned from a workman's comp.leave, and although successfully completed NEST again was terminated not long thereafter.

42. The defendant also, **AFTER** plaintiff's termination, modified the NEST course as a means of reducing injuries and increasing the number of technician who pass the course [see exhibit #5, Deposition of Dave Rateliff pg. 48 line 6 thru pg. 50 line 24 and pg. 60 line 1 thru pg. 62 line 18].

unfounded fears, stereotypes, and prejudices that have permeated our society. One of the goals of the third prong of the ADA, 'regarded as' is to address this and to hold those who discriminate, even if due to misperceptions, accountable.

44. I believe I was discriminated against due to my

gender, perceived as disabled, and further, retaliated against. I believe this because I know it to be true; I have experienced and lived it.

Further affiant sayeth not.

s/Tonia E. Fisher

Subscribed and sworn before me this 9 day of Mar, 2009

s/Frank Raymond
Notary Public

My Commission Expires December 30, 2012

FOR THE NORTHERN DISTRICT OF OKLAHOMA

TONIA E. FISHER	)
	) CASE NO.: 07-CV-433-CVE-FHM
Plaintiff,	)
	) FEDERAL QUESTION
v.	)
	) JURY TRIAL DEMANDED
SOUTHWESTERN BELL	)
TELEPHONE COMPANY;	)
(a Foreign For Profit	)
Business Corporation)	)

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

Defendant in this action, Southwestern Bell Telephone Company, seeks to dispose of all of the claims in this action and avoid liability, therefore, evading accountability. Plaintiff will show in this brief that the defendant's proffered reasons for the negative employment action were pretextual; the real reasons were discrimination and retaliation. Plaintiff's claims are valid, and as such, deserve to be tried on the merits. Defendant is not entitled to summary judgment.

Plaintiff, Tonia E. Fisher, initiated this action against the defendant, Southwestern Bell Telephone Company (SWBT) to seek redress and remedies for

the knowing and intentional discrimination and retaliation that resulted in her termination from employment. The facts in this case will show that plaintiff experienced more than two and one-half years of unfair/unjust treatment by the defendant (alter she filed an EEO complaint), before she was ultimately dismissed. The defendant's stated reasons for it's actions are nothing other than a pretext in attempt escape liability. There are genuine issues of material fact on each every claim in this action that preclude the granting of summary judgment.

I.
BACKGROUND

Plaintiff began employment with the defandant in 1997 under the title of Systems Technician. She spent the next two(2) years in the Construction Dpt. and then transferred to the Installation and Repair division under the title of Customer Service Technician. Plaintiff's chief duties were installing and repairing residential and business services, all the while maintaining customer satisfaction.
Plaintiff enjoyed her work, co-workers, customers, and the overall sense of making a contribution. After five and one-half years of never missing a days work and giving 100%+ the defendant suspended, without pay, for four months this single mother who had worked hard to make a better life for her and her family.

Defendant justifies this by stating the plaintiff violated policy requirement to **immediately** report an off the job driving charge. Defendant has never produced any evidence showing that plaintiff was even aware of the policy; it was never even covered with her. If not but for the plaintiff informing defendant, to this day they would have no knowl-

edge of such. Plaintiff at all times has maintained a valid drivers license. Her DMV record then and since then reflects zero points.

The defendant SWBT, intentionally discriminated against plaintiff, a female, who worked very hard to learn and earn technical skills and apply them in an outside environment. The number of females the defendant employs in the outside craft field [highest paying non-mgm't positions] is indicative of the discrimination that has resulted in lost opportunity for many.

During the four month unpaid suspension, plaintiff filed an internal EEO complaint not knowing
this would spawn the beginning of the end of her career. After utilizing the HOTLINE the defendant recommends for reporting violations, and the union initiating a grievance on her behalf, plaintiff was thereafter scrutinized and targeted for ultimate termination.

In August 2005, plaintiff took a short term disability leave. Cumulative stress both on and off the job had taken it's toll on plaintiff's well being. Plaintiff was extremely concerned, due to the happenings since the EEO report, that defendant would use plaintiff's decline in health in an attempt to justify the finalization of her employment. The paper trail that began after the EEO report was ripe for it's intended purpose. Plaintiff communicated to her area mgr., Mr. James, her fears of what was happening and requested to take a leave of absence rather than the paid disability leave.

Plaintiff knew the defendant frowned upon disability leave. Plaintiff also wanted to avoid the

appearance that disability leave may give. No matter how justified and necessary, there will always be some whose ignorance promotes the worst. A regular leave of absence is unpaid, however, plaintiff preferred to take the unpaid leave to protect any portion of her job, if any, that was still left. Also, because plaintiff was truly not well and neither her nor her doctors knew an estimated recovery date, she wanted to avoid giving the defendant any further ammo to end her career.

Mr. James told plaintiff that "a leave of absence doesn't apply in this situation" and the leave was denied. The defendant never relayed to plaintiff her right under their own policy to appeal such a determination. In February 2006, plaintiff obtained a doctor's release to return to work. The release specified physical restrictions[See Exhibit A]. The defendant without even asking how long the restrictions were anticipated to last, denied accommodations[See Exhibit B]. According to the defendants's third party administrator who manages their disability determinations, the defendant just said no they could not accommodate. This is not what their own Transitional Work Policy states and is against the ADA.

By refusing to accommodate plaintiff's physical limitations, and not allowing a leave of absence, defendant effectively extended the length of time plaintiff was on short term disability. [See Exhibit C]. This scenario repeated itself for six(6)months before plaintiff was finally given the opportunity to return to work. Upon plaintiffs release of physical restrictions, defendant re-uired as a condition of employment that plaintiff re-attend NEW EMPLOYEE

SAFETY TRAINING(NEST). Plaintiff had previously attended such training as a new employee and was aware of the vigorous physical component of the pole climbing. This was not a part of plaintiff's job duties that she experienced since 1997.

Further, Mr. James had verbally assured her while she was on the disability leave that this would not be necessary and that the defendant would 'work with her' upon her return. This was in response to a communication initiated by plaintiff expressing her concerns that the defendant was going to "try and find a way to get rid of me'. NEST is traditionally known to be a difficult course to pass and the risk of injury is real.

Plaintiff knew defendant had a bad motive, The requirement to attend NEST had nothing to do with the stated "safety concerns". Over the previous nine years of plaintiff's employment in a 'climbing title' not but one time did defendant ever request her pole climbing ability or offer the refresher training their own policies mandate every three years. Now they were requiring plaintiff to perform her job in what she considered an unsafe manner that she never had found necessary to accomplish the same end result; customer service.

The probability of unnecessary injury along with the discrimination that plaintiff was further experiencing led her to protest the requirement. [defendant's stated reason for the requirement other than 'safety', was plaintiff's **LENGTHY DISABILITY**; even though the defendant themselves had not allowed the return to work under accommodations]. Plaintiff voiced her opposition and reasoning to her area mgr., Mr. James, and was suspended without pay and subsequently terminated.

The issues in this case are real. Plaintiff can and will point to evidence that gives rise to an Inference of unlawful gender, disability (as defined within the meaning of the ADA) discrimination and retaliation. This brief will demonstrate there are issues to be tried to the finder of fact as this Court applies the law. Defendant's orchestration of the demise of plaintiff's career cannot go without accountability. Defendant is not entitled to summary judgment on any of the claims in this action. In the end, as it should, truth always trumps bad motive.

Respectfully submitted,
s/Tonia E. Fisher
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734-233-7046
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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of Mar. 2009, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrant(s): Kimberly Lambert Love, Robyn M. Funk, Mary L. Lohrke, Mary C. Coulson

s/Tonia E. Fisher

PLAINTIFF S RESPONSE TO DEFENDANT'S STATEMENT OF UNDISPUTED FACTS

***The following numbered paragraphs Correlate to defendant's statements of undisputed facts.

1. Not in dispute.
2. Not in dispute.

Safety Traininf and Safety Policies

3. The 'Safe Pole Climbing' course is not so safe [See plaintiff's affidavit ¶¶5.], [See Exhibit 1, plaintiff's deposition; pg.90 line 21-pg.91 line 13]. The defendant finally acknowledged this in 2007, **after** plaintiffs opposition and termination. The defendant modified the
course to ensure virtually no injuries and a much higher passing rate. [See Exhibit 2, deposition of Dave Ratcliff; pg. 60 line 12-pg. 62 line 17].

Plaintiff's Short Term Disability Leave

4. Plaintiff's Aug. '05 disability leave was due to stress both on and off the job [See plaintiffs affidavit¶15, 17], [See Exhibit 3, deposition of Jess Storie; pg.20 line 15].
5. Not in dispute.

Plaintiff's August 2006 Return To Work On Light Duty

The Transitional Work Program was never discussed with plaintiff. She was handed a copy after her return to work [See plaintiff's deposition pg. 183 line 4-pg. 184 line 20], [See Exhibit 4; Transitional Work Program].

Plaintiff's Release To Return To Work Full Duty

7. Not in dispute.
8. Plaintiff disputes that the requirement to demon-

strate how to safely access a pole is consistent with with SWBT practice. Defendant did not follow their own recertification training requirements [SeeExhibit 5, SWBT 00992, SWBT 03282].

9. Mr. James stated concern for plaintiff's safety is false. Mr. James did not base his desire to require NEST training for plaintiff based upon the 'new information' she did not have gaffs. Mr. James was inquiring into NEST for plaintiff in AUG. 06, his alleged 'not knowing she did not have gaffs' was 19 Oct 06. [See Exhibit 6, SWBT 001223;e-mail of Mr. James].

10. Not in dispute.

11. Plaintiff never admitted she could not climb a pole with gaffs, rather she felt that climbing with gaffs was unsafe. [See Exhibit 7, plaintiff's deposition pg. 208, line 4 pg. 209 line 24].

Plaintiff's Suspension and Termination

12. Not in dispute.

13. Not in dispute.

14. Insubordination was only a pretext for discrimination and retaliation. Plaintiff was never disrespectful or otherwise insubordinate. She protested what she believed, and does to this day, to be unlawful employment discrimination. [See Exhibit 8, notes of mtg., PLS DOC PROD 32].

15. The 'other male technicians' who were required to re-attend NEST...this list tainted. The only male tech. prior to plaintiff, Orville Merryman, had been out on a worker's comp. He re-attended NEST, successfully passed, and was subsequently terminated. Dave Ratcliff was required to go after having been out of the field approximately five years as union president. He previously relayed to me he thought the only reason they were requiring that of him is

because they did of me. No former union president names (who are out of the field years at a time) were ever produced by the company. It is plaintiff's understanding the other male names on the list were former employees, ie: retirees, who were rehired as NEW EMPLOYEES. At the time of plaintiff's protest, she nor the union president had ever heard of anyone ever being sent back to NEST after having successfully passed it once. Likewise, Mr. James stated in the investigatory meeting (prior to the lawsuit being filed) that he hadn't attended that course in 25 years. After the lawsuit was initiated he has stated he re-attended in 1992 or so. [See Exhibit 9, notes from mtg., PLS DOC PROD 36]0 [deposition of Mr. James, pg. 97 line 4-6].

Plaintiff's ADA Discrimination And Gender Claims

16. Not in dispute.

17. Mr. James was aware of plaintiff's weight loss. [plaintiff's affidavit ¶19]. Further, Mr. James contacted the disability unit and inquired into plaintiff£s diagnosis [See Exhibit 10, SWBT 0034], [See Exhibit 11, SWBT 001226].

18. Not in dispute.

19. Not in dispute.

20. Not in dispute.

Plaintiff's Retaliation Claims Based On A.2003 Complaint

21. Plaintiff never stated her termination was in retaliation for a 2003 HOTLINE complaint. Plaintiff stated her belief that it(all the negative following EEO report, to include termination) 'stemmed' from such [See Exhibit 12, PLS DOC PROD 0027].

22. Grievance process was tainted; plaintiff only agreed to the conditions as she had been not allowed to earn a paycheck for four months. It was certainly

under duress [See plaintiff's affidavit ¶11].
23. Although Mr. James states he was 'unaware' of the 2003 EEO report, this defies sound Reasoning and is unworthy of belief. His fiancée at the time was involved with part of the OESC appeal that was later required, as a condition of employment, to be dismissed. Defend-ant has previously in this action produced affidavits that have turned out to be untrue; Mr. Ed Brady-Ass't Director of Training for the five state region submitted an affidavit stating they did not keep recordsof injuries occurring durmg training. It was only after plaintiff asked further about OSHA 300 Logs that are required by Federal Law, **after** Mr. Brady's affidavit, that the defendant produced some injury documentation.
24. There is an inference that Mr. Cliff Agee was more involved with employment decisions than admitted. It is plaintiffs understanding Mr. Agee was allowed to retire following a sexual harassment scenario. Sexual harassment is definitely form of gender discrimination. Mr. Agee and plaintiff communicated during plaintiffs unpaid four month suspension; he was fourth or fifth level management. Defendant submitted a chain of command chart and later changed it [See Exhibit 13, SWBT 0264, twice] perhaps upon learning of my knowledge of the reason for Mr. Agee's departure. Both of these documents have the same Bates number from the defendant, however, a close reading shows that during the month of Oct. 2006 (the month and very day plaintiff was required to re-attend NEST, defendant showed at first Agee to be in the chain of command, later revised it [See Exhibit 13 and currently states the revised correction is the correct one. An e-mail dated 20 Oct 06 [See Exhibit 14, SWBT 001404] shows Mr.

Agee is authorizing a travel request for NEST and further he specifies about plaintiff driving the company truck, all **after** the time he is shown on the revised document to be in the chain of command.
25. Same inference for the reasons stated above.
Plaintiff's Retaliation Claim Based On 2006 Complaints
26. Plaintiff termination was also in retaliation for the direct complaint she made to Mr. James.
27. Mr. James also knew plaintiff felt singled out and harassed, yet he concluded, without speaking to plaintiff about such, that it was unfounded [See deposition of Mr. James, 26 line 10 - pg. 29 line 7]
28. Plaintiff's failure to accommodate claim is within the scope of the EEOC charge. A failure to accommodate is also a method of proving a 'regarded as' claim. Defendant appears to argue it couldn't have perceived plaintiff as disabled because she returned to work under the TWP with temporary restrictions. Defendant forgets that the very alleged reason they would not accommodate was because there were no projected duration for the restrictions being lifted.

AFFIDAVIT OF TONIA E. FISHER

I, Tonia E. Fisher, of lawful age and being first duly sworn upon oath state as follows:
Statements referring to events prior to the claims in this lawsuit are for relevant background information. This foundation is necessary in viewing the totality of the circumstances.
1. I submit this affidavit in support of plaintiff's Response In Opposition to defendant's Motion For Summary Judgment.
2. The statements contained herein are from my personal knowledge and experiences.
3. I began employment with the defendant, South-

western Bell Telephone Company, under the title of Systems Technician in June of 1997. I was assigned to the Construction/Engineering group as a splicer. I was required, as a condition of employment (after having been hired), to pass additional tests relating to the Systems Technician title. I successfully completed these tests.

4. I remained in the Construction dpt. for approximately two(2) years working under two(2)different supervisors. For safety reasons, I utilized a ladder while performing aerial work, and never one time climbed a pole with gaffs(hooks). I successfully performed my job duties.

5. In October of 1999 I applied and was approved for a transfer to the Installtion/Repair dpt. in Owasso, Oklahoma. I was the only female technician on the crew and one of few within very the metropolitan Tulsa area. From Oct. 1999 through Nov. 2006, I worked under six(6) different supervisors at various times. My first supervisor in Installation/Repair, Mr. Gary Hicks, told me if there were ever a time I needed a bucket truck to call a fellow co-worker who was assigned such. Over the course of seven(7) years, there were only a handful of times when this was necessary. I was fortunate enough to work with gentlemen who believed in teamwork and this was a win/win situation. I never one time climbed a pole with gaffs while performing my job duties. The majority of my work time was spent in the Owasso area, however, at times I also was 'loaned' to other areas. I was always able to utilize a ladder when aerial work was necessary. I found the ladder to be the safest and therefore the best method to access non-stepped poles. Also I knew from my experience in the 1997 NEST course

of the real possibility of what is referred to as 'cutting out' on a pole. 'Cutting out' occurs when the gaff is not inserted at the precise angle to the pole. This exact thing happened during my final testing in the 1997 NEST course at eighteen feet in the air. By the grace of God I was able to quickly catch myself without 'burning the pole'. The term 'burning the pole' is common among outside technicians and refers to your body literally getting burned by the pole as you fall down. This is in addition to being impaled with splinters of varying sizes up to inches. Of course another logical consequence of 'cutting out' is the injuries received from the fall itself. Due to my experience at the NEST course, I considered whether this was even something I wanted to do for a living. I was reassured by other technicians at the class that all I had to do was pass the course; it was more like a 'right of passage' and that in the real world I would probably never have to climb with the gaffs. My actual working experience over the course of the next nine(9) years proved this to be true. In the Owasso area, aerial work was limited to less than ten percent of all jobs. As in the Construction dpt., I utilized a ladder to access aerial lines. I found this to be the safest means to accomplish the end result; customer service.

6. My appraisals for the years 97-2001 all reflected meeting expectations. In 2001 my rating was even exceeding expectations. Appraisals were given each year for ratings in the previous year. For example, my appraisal for the year 2002 was actually given in the spring of 2003.

7. In late 2002 I was suspended without pay for approximately four(4) months. The stated reason by the company was that an 'investigation' would be

conducted and also, that I had not **immediately** reported an off the job driving impairment charge. I at all times maintained a valid driver's license. My license was never suspended nor revoked, and my DMV record at that time and at all times since has zero points.

8. I was unaware, as explained at the time, that I had a duty to immediately report such. To date, the defendant has produced no evidence showing I was made aware of this requirement.

9. During the four(4) month unpaid suspension, after being informed by a 30+ year veteran of the company that a male SBC OKLAHOMA PRESIDENT had received the same charge in addition to carrying a loaded firearm and was not suspended, but rather subsequently promoted, I filed an internal EEO complaint. At the time of the unpaid suspension, I was a single parent with my sole source of income being my employment.

10. In early Spring 2003 a meeting between myself, human resource manager Betty Hondronastas, human resource manager Randy Frevert, and union representatives was held. It was during this meeting that the union and I explicitly communicated gender discrimination.

11. Subsequent to this meeting, as a condition of continued employment (and coerced under duress), I was required to sign an agreement wherein I was required to drop the pending OESC appeal, forfeit all back pay, go to mandatory EAP meetings with a company selected provider, and be subjected to random drug and alcohol testing for two(2) years in exchange for my returning to work to earn a paycheck. I have never taken drugs in my life except medications prescribed by an M.D. for a certain period of

time. Further, I do not have a drinking problem and it was never suspected that I did.
[See Exhibit #7, Ciskowski deposition pg. 20 line 6 thru pg. 22 Line 3]
The random testing was just a means harassment and singling me out **after** the EEO complaint. I was a single parent at the time, my bills were piling up and I already had been without an income for four months.
12. Upon my return to work in April 2003, the beginning of the end of my career ensued. On my first day back to work I was immediately presented with my performance appraisal for The year 2002. It listed attendance and safety as unsatisfactory. Prior to the four(4) month un-paid suspension, I had never missed a days work in over five and one-half years. Likewise, I had no on the job safety deviations.
13. I refused to sign the appraisal and stated "it will never fly". The union initiated a grievance on my behalf.
14. From my return to work in 2003 through my termination in 2006 I was scrutinized and targeted for termination. My mental health began a steady decline manifesting itself in physical symptoms such as crying, irritability, and a clearly noticeable substantial weight loss.
15. During the time period Apr. 2003 - Aug. 2005 I was under a tremendous amount of stress due to on and off the job happenings. One of the greatest negative stressors that exists is for ones very livelihood to be jeopardized.
16. Climbing a pole with gaffs was never a necessary part of my job duties which I performed successfully; even exceeding expectations prior to the EEO complaint. Management was never 'concerned' enough

about gaff climbing to make the required observations [see exhibit #1, PL'S DOC PROD 34] or to provide the recertification training per their own work-safe policy [see exhibit # 1 a.].

17. In Aug. 2005 my coping abilities had deteriorated to the point I was not well at all. At my area manager's (Mr. Curtis James) recommendation, I took short term disability leave.

18. I was extremely concerned that the company "was going to try and find a way to get rid of me" and communicated such to Mr. James shortly after beginning the disability leave. As communicated, this feeling was due to the prior experiences for the previous two and one-half years. I did not want my illness to be used against me. Initially Mr. James told me to not worry and just go get healthy and the company would work with me upon my return. He even mentioned a window of time after I returned that the company would understand I would not be 100%. Later, in a different phone call Mr. James informed me I may have to be retested on some things upon my return to work. I interpreted this as red flags and asked him if he were referring to pole climbing [pool climbing school is known to be difficult, even dangerous]. I further stated I was qualified for my job. Mr. James said he would have to get back with me. When I did not hear back from him, I again contacted him and was assured I was qualified and would not have to be retested.

19. In a later phone conversation with Mr. James while the disability leave I communicated to him that
I thought perhaps the doctor's suspected I had cancer (due to the weight loss and consistent diarrhea I was experiencing at the time). A later colonoscopy and up-

per GI test revealed no cancer.
20. I was aware from my time with the company that any disability leave was frowned upon. As such, I requested a leave of absence. Although the short term disability is a paid leave, I preferred an unpaid leave to avoid the appearance of 'milking the benefit' [I nor my doctors knew the duration I would be off work], and also to avoid discipline upon my return for 'attendance'.
21. On multiple occasions I was denied a leave of absence being told that "it doesn't apply in this situation". I was never informed of my right per company policy to appeal that determination.
22. After being initially being denied the leave of absence, I requested to return to work; "is there anything I can do?". I was informed by Mr. James that I could not transfer while on a disability leave even though I was merely requesting to return to work doing anything. I was not seeking a formal transfer.
23. In Feb. 2006 my doctor issued a RTW release with physical restrictions. The defendant refused to allow me to return with an accommodation, not even asking how long the restrictions were anticipated to last [see exhibit #2, SWBT 0119].
24. After the denial of accommodations for my return to work in Feb. 06, defendant at a later date finally agreed to such, however, initially stating for a max. of thirty (30) days (again, against their own transitional work policy). Defendant later increased the time to a max. of sixty (60) days.
25. I communicated my concern over losing my job to my doctor and the defendant's refusal to accommodate longer than sixty (60) days. My doctor agreed to limit the restrictions to the defendants demands.
26. I was informed by my disability case worker,

Kaydra Fleming, that I should be allowed to take a leave of absence; this was due to both her and her supervisors understanding [see exhibit #3, PL"S DOC PROD 0022-0025].

27. Upon my return to work in Aug. 2006, I was assigned phone work following up customer satisfaction and whether or not the technician had followed proper procedure and kept the customer informed throughout the work process. I was allowed in the field for part of one day to do inspections for my supervisor. I never rode with other technicians or was allowed to return to my technical position.

28. On the afternoon of 19 Oct 06 I was told by my supervisor, Ms. Johnson (at that time), that on the following Monday 23 Oct 06, I would ride with another technician; presumably to get acclimated back to the field environment. I was also told I would be required to demonstrate handling a ladder and at a later point, about a week, I would be expected to demonstrate pole
climbing. This was not a big concern because even though I did not climb with gaffs the job, I knew I could demonstrate such as I similarly did before in 2004 at a 'rodeo'; the only other time in nine (9) years the defendant requested such. I further informed my supervisor that I would need a pair of gaffs as mine had been gone for years. It was not unusual for other technicians to procure items from another truck... this happened often with tools.

29. I had previously informed my former supervisor, Jess Storie that I had no gaffs in 2004 at the rodeo demonstration. He told me he would order some and I never heard any more about it.

30. At the end of the day on 19 Oct 06, I was informed by Ms. Johnson that the following Monday,

23 Oct 06, I was required to report to OKC for the NEST course. Having been through NEST before, I knew the vigorous and physical strength needed which was much more extensive than my regular job duties. Because of my prior fears ("trying to find a way to get rid of me"), I became visibly upset and requested to speak with Mr. James.

31. Ms. Johnson initiated a call to Mr. James on my behalf whereby I asked "what happens if I don't pass?". I was specifically told by Mr. James "you might be given another chance", I also asked if the NEST requirement was a condition of employment. Mr. James stated he would have to get back with us. I waited forty-five minutes past my scheduled time off for Mr. James to call back which he never did. I informed Ms. Johnson that when he called to please have him call me on my cell phone and that I was going home.

32. 19 Oct 06 fell on a Thursday. I never received a call back from Mr. James that evening and was literally up all night long sick to my stomach. My fears were more than a nightmare, I realized they were a reality.

33. Approximately 7 a.m. the next morning I phoned Ms. Johnson and explained that Mr. James had never called and I had been up all night sick. I again requested a return call. That afternoon I received a call with both Ms. Johnson and Mr. James on the line. Mr. James stated that the NEST requirement was a condition of employment and that it would be considered an act of 'insubordination' if I did not attend. It was apparent to me that at that point it didn't matter whether I went or not, termination was inevitable. The defendant had orchestrated quite a paper trail in the two plus years since my

EEO complaint. Prior to the EEO complaint, with six different supervisors over six years there was minimal web ad documentation (paper trail). One of the web ads referenced a call from the Regional vice-president of complex sales, complimenting my service at her personal residence. It was stated 'if all technicians were like Toni no one would ever leave SWB. The negative web ads began **after** the EEO complaint.

34. Later that day, 20 Oct 06, I phoned the area Director Mr. Charles Ciskowski. It was in that phone call I explained to him my safety concerns, which were real. I further communicated that I would fight all the way if I got terminated over such. Mr. Ciskowski told me he would speak with Mr. James and if "anything changes we'll let you know".

35. I spent the entire week-end replaying scenarios of the past few years in mind. From the internal EEO complaint forward nothing was ever the same. Now the defendant was requiring, as a condition of employment, something that would likely have resulted in injury. There was no question as to the discrimination and retaliatory intent and I made a decision to stand up for myself. All I wanted was to return to work and be left alone. To be permitted to perform job in the same manner I had for the previous nine years; accomplishing the mission of customer service. I also knew defendant's stated reason 'safety concerns' were bologna. It was the plaintiff herself who first expressed genuine safety concerns. Further, the defendant had for the prior nine years not followed their own work-safe plan for certain safety training; to include refresher training requirements [see exhibit #4].

36. Monday morning 23 Oct 06, I called Ms. John-

son and told her I had not gone to NEST and asked if I was to report in. At first Ms. Johnson stated "we have no more transitional work for you". About five minutes later she called back and told me to report to the Owasso Central Office.

37. Upon my arrival at the Owasso office I was met by union steward Bob Martin. Mr. James and Ms. Johnson arrived and what was termed an 'investigatory meeting' was held [see Exhibit #4]. My parents had previously advised me to protect myself and record things when they became aware of the defendant refusing to allow me to return to work with accommodations. For this reason, and because Mr. James had already lied to me, I recorded the meeting with an audiotape. I figured that way there could be no question as to what was actually said. I explained why I did not go to NEST, that it was discrimination, harassment, and I was going to fight it. I was suspended without pay shortly thereafter "pending further investigation".

38. In the interim four weeks before my termination, I filed a second internal EEO complaint.

39. On 17 Nov 06 what was referred to as "A DAY IN COURT" meeting was held. Five to ten minutes before the meeting began I received a phone call stating the EEO investigation did not substantiate my complaint. As I expressed then to the caller, I was not surprised and was going to an outside agency (EEOC) for help. Myself, Two (2) union reps., Mr. Ciskowski, and Mr. James were present. Mr. Ciskowski opened by stating "if there are any recording devices they needed to be turned off now". He also stated that the background of the NEST requirement was **"your lengthy disability'.** This was disturbing in more ways than one. The defendant would not

allowed me to return to work when I was initially released with restrictions rather I had to wait an additional six (6) months before they finally agreed to such. I was informed this was not a time to argue the case. I reiterated what they had done and what they were continuing to do was illegal, against Federal Law, and that AT&T and their management would be held accountable. At all times while communicating my position, although very upset and angry, I remained respectful and professional.

40. It was my understanding I was terminated effective immediately.

41. After the termination in pursuing remedies per the collective bargaining agreement, the defendant did not cooperate with the grievance process in producing all requested documentation until a National Labor Relations Board charge was filed by the union. [see exhibit #5]. The defendant later produced the name of one male technician who had been required to re-attend NEST as a condition of employment. This technician had returned from a workman's comp.leave, and although successfully completed NEST again was terminated not long thereafter.

42. The defendant also, **AFTER** plaintiff's termination, modified the NEST course as a means of reducing injuries and increasing the number of technician who pass the course [see exhibit #5, Deposition of Dave Rateliff pg. 48 line 6 thru pg. 50 line 24 and pg. 60 line 1 thru pg. 62 line 18].

unfounded fears, stereotypes, and prejudices that have permeated our society. One of the goals of the third prong of the ADA, 'regarded as' is to address this and to hold those who discriminate, even if due to misperceptions, accountable.

44. I believe I was discriminated against due to my gender, perceived as disabled, and further, retaliated against. I believe this because I know it to be true; I have experienced and lived it.

Further affiant sayeth not.

s/Tonia E. Fisher

Subscribed and sworn before me this 9 day of Mar, 2009

Notary Public
s/Frank Raymond

My Commission Expires December 30, 2012

B-1

CASE NO.: 09-5046

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TONIA E. FISHER	)
(an individual),	)
Plaintiff-APPELLANT,	)
	)
v.	)
	)
SOUTHWESTERN BELL	)
TELEPHONE COMPANY;	)
(a foreign for profit	)
business corporation),	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

The Honorable Claire V. Eagan
District Judge
D.C. No. 07-cv-OO433-CVE-FHM

APPELLANT'S OPENING BRIEF

Respectfully submitted,
Tonia E. Fisher
11351 N. Ridge Road
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(734) 233-7046

Oral Argument Requested

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ARGUMENT 27-49

1. **The District Court erred in dismissing AT&T Inc.**
   a. It was prejudicial to deny jurisdictional discovery
   b. No appropriate legal analysis was performed in connection with determination of " employer"
2. **The District Court erred in limiting the amendment to the complaint.**

a. Exhaustion of administrative remedies was complete and proper
b. The scheduling Order was extended for the purpose of joining/ adding parties, amending the complaint
c. Undue delay, futility, and prejudice were unsubstantiated factors in the denial of amendment for state law claims
d. It was an abuse of discretion to limit amendments to the complaint

3. **The District Court erred in affirming magistrate Orders**
   a. In the context of the claims, It was clear error to not recognize the precedential privilege of the psychotherapist records; Jaffee v. Redmond (95-266), 518 U.S. 1, (1996)
   b. It was prejudicial to deny relevant discovery
   c. Discovery proceedings were not in accordance with due process
4. **The District Court erred in denying leave to file out of time a supplement in opposition to summary judgment.**
   a. Given the circumstances surrounding the summary judgment phase, it was prejudicial to deny leave to file supplement in opposition.
5. **The District Court erred in denying relief under FRCP 60b on the state law claims**
   a. Oklahoma Supreme Court clarifies the parameters of a Burk Tort claim
   b. There was no undue delay in filing the 60b motion
   c. The state law claims were only futile in that the District Court denied them contemporaneously with granting summary judgment

6. **The District Court erred in granting summary judgment and subsequently denying FRCP 59e motion to alter the judgment**
   a. The proper legal standards for evaluating a motion for summary judgment were not adhered to
   b. Pertinent evidence was disregarded
   c. Reconsideration was neither thorough nor complete

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PRIOR OR RELATED APPEALS

There are no prior or related appeals in this case.
I, Tonia E. Fisher, appearing on behalf of herself, plaintiff-appellant, for her opening brief states:

STATEMENT OF JURISDICTION

The United States District Court for the Northern District of Oklahoma, had Jurisdiction over this matter pursuant to 706(f)(3) of Title VII, 42 USC§2OOOe-5(f)(3), 28 USC§1331, 28 USC§ 1337. The District Court entered a final judgment in this action on 6Apr09, Fisher filed a timely notice of appeal. Thereafter, a FRCP 59e motion was filed by Fisher within ten days of the final judgment. The Tenth Circuit abated the appeal pending disposition by the District Court, which was entered on 1 Jun 09. On 22Jun09 Fisher timely filed an amended notice of appeal. This Court's jurisdiction is proper and derives from 28 USC§1291.

STATEMENT OF THE ISSUES

A. Whether the District Court erred in dismissing AT&T Inc. as a defendant in the action without allowing for jurisdictional discovery.

B. Whether the District Court erred in denying an amendment to the complaint to add state law claims.

C. Whether the District Court erred in affirming the Magistrate's Orders.

D. Whether the District Court erred in denying Fisher's [1]motion for leave to file out of time a supplement to her opposition to summary judgment.

E. Whether the District Court erred in denying Fisher's FRCP 60b motion.

F. Whether the District Court erred in granting summary judgment to the defendant, and denying FRCP 59e relief.

STATEMENT OF THE CASE

This case illustrates the efforts of an individual to seek redress and remedies against a large corporation for discrimination and retaliation that culminated in the individual's loss of employment.

Appellant, (hereinafter referred to as Fisher), initiated this action in the District Court for the Northern District of Oklahoma against appellee, (hereinafter referred to as SWBT), for discrimination and retaliation in employment, and the resultant effects.

Through a mutual agreement, former counsel for Fisher filed the complaint in the District Court to ensure compliance with the statutory time. Prior to the summons of service on defendant(s), Fisher was permitted by the District Court to proceed pro se.

The proceedings in the lower Court consisted

of extensive filings by both parties. After pre-trial preparations, including pre-trial disclosures, a proposed pre-trial Order, motions in limine, exchange of witness and exhibits lists, proposed voir dire and jury instructions, the District Court granted SWBT summary judgment in it's entirety.

In granting summary judgment the District Court misapprehended the facts, Fisher's position, and the controlling law. The Court viewed all evidence in favor of the moving party, and did not disregard all the evidence in favor of the moving party that a jury is not required to believe.

All reasonable inferences were not drawn in the non-movant's favor, and SWBT was not entitled to judgment as a matter of law. In essence, the District Court did not adhere to the legal standards established for addressing a motion for summary judgment.

Fisher began employment with SWBT in June 1997 under the title of Systems Technician, she was assigned to the Construction Dpt. In Oct 1999 Fisher transferred to the Installation/Repair Dpt. In early 2003 Fisher contacted the internal EEO through SWBT's internal hotline to report gender discrimination. The EEO report was during a four month unpaid suspension of Fisher by SWBT. Fisher returned to work in April 2003 through a grievance process that required Fisher to agree to certain conditions of continued employment. Fisher signed the agreement, under duress.

Immediately upon her return to work in April 2003, Fisher was presented with her first negative performance evaluation of her career. The evalua-

tion listed two areas as 'unsatisfactory'; attendance and safety. Prior to her four month unpaid suspension, Fisher had not missed one days work in over five and a half years. Likewise, Fisher had never had an on the job safety deviation.

From the point of her return to work in Spring 2003, after the EEO report, through her termination in Nov. 2006 Fisher was scrutinized and targeted for termination. As one part of that scrutinization, Fisher was subjected to random drug and alcohol testing no less than thirteen times within a two year period. Fisher did not have a drug or alcohol issue; all test results were indicative of this. The testing was a means of harassment AFTER the EEO report.

By August 2005, Fisher's health had deteriorated due to on and off the job stress. At her area manager's recommendation, she contacted her doctor and the disability unit. Fisher was approved for short term medical disability leave with appropriate medical documentation. Fisher remained on the disability leave, and under a physician's care, until her return to work in Aug. 2006.

Fisher attempted to return to work in February 2006 with restrictions of no lifting for one month, however, SWBT would not accommodate. Fisher had lost a substantial amount of weight and muscle mass. SWBT's refusal to allow her to return to work only exasperated this. Finally SWBT allowed Fisher to return in August 2006, still under physical restrictions, with the understanding she could resume her 'regular job duties' in October. In the interim, Fisher was placed in SWBT's 'Transitional Work Program' where her assignment consisted of making follow up phone calls on customer service.

Upon her full release to her 'regular job duties' from her physician, SWBT told Fisher, and required as a 'condition of employment', that she re-attend NEST (New Employee Safety Training).

A significant portion of NEST training consists of strictly pole climbing with gaffs. Fisher had never heard of anyone else ever having to re-attend NEST. Due to Fisher's belief that the directive was discriminatory, retaliatory, and constituted unnecessary safety risks, Fisher did attend NEST. An 'investigatory meeting' was held to determine why Fisher did not attend NEST.

Fisher's 'regular job duties' for the prior nine years did not require pole climbing with gaffs and she genuinely believed this to be discriminatory and a further form of retaliation. Fisher communicated this and also stated safety concerns; gaff climbing can be dangerous and was not necessary for her to perform her job.

Fisher was immediately suspended without pay, again. Fisher made another Internal EEO report and approximately four weeks later she was terminated.

SWBT's stated reason for the termination was 'insubordination' for refusing to attend NEST. The stated reason of SWBT was merely a mask to disguise the true intent and reason; discrimination and retaliation. Fisher was subjected to a pattern of scrutinization after her internal EEO report in 2003 and was engaging in a good faith genuine belief of discrimination and retaliation when she opposed the condition of employment requirement for NEST.

The law refers to this as 'protected opposition'. Subsequent to Fisher's termination, SWBT modified

the NEST course to decrease the failure rate and **eliminate injuries.**

STATEMENT OF THE FACTS

Relevant to issue A

Naming of AT&T as a defendant

AT&T Corp. was inadvertently named as Fisher's employer in the original complaint [Docket #2, Complaint, filed 8 Aug. 07]. In Fisher's response to AT&T Corp.'s motion to dismiss, it is explained that she viewed her employer as AT&T and why the confusion arose [Docket #22, Response to motion to dismiss, filed 13 Feb. 08].

After contacting the Sec. of State for Oklahoma, Fisher determined that the proper defendant's were SWBT and AT&T Inc. Along with SWBT, Fisher named AT&T Inc. as a defendant in the District Court case 07-cv-00433-CVE-SAJ [Docket #25, Amended Complaint, filed 21 Feb. 08].

Thereafter, on the 28 day of Mar. 2008, AT&T Inc. filed a motion to dismiss for lack of personal jurisdiction and alternatively, failure to state a claim upon which relief may be granted [Docket #45, 46, Motion to Dismiss, filed on 28 Mar, 08].

Request for jurisdictional discovery

Fisher followed up with her response in opposition [Docket #48, Response in Opposition, filed on 18 Apr. 08] which, in part, argued for jurisdictional discovery. The District Court dismissed AT&T Inc. for lack of personal jurisdiction without allowing discovery on the matter. The District Court determined that AT&T Inc. was not Fisher's employer. [Docket #55, Opinion and Order, filed 20 May 08].

Relevant to issue B

Amendment to add state law claims

The scheduling Order in the District Court set a 15 Jul. 08 cut-off for amending pleadings [Docket #62, Scheduling Order, filed on 20 Jun. 08]. Fisher filed a FRCP
60b motion [Docket #72, Motion to Alter Order/ Judgment, filed 8 Aug. 08] seeking to reinstate the retaliation claim that was previously dismissed by the Court [Docket #55, Opinion and Order, filed 20 May 08].

Fisher argued that the administrative remedies in fact, exhausted and were, presented a new right to sue letter and Notice of Intent To Reconsider by the EEOC [Docket #72-2, Right to Sue Letter, Notice of Intent To Reconsider, filed 8 Aug. 08]. The District Court issued an order [Docket #78, Order, filed 13 Aug. 08] extending the date on the scheduling Order for parties to amend the pleadings from 15 Jul. 08 to 15 Aug. 08.

District Court limits amendment even after recognizing exhaustion of remedies

Explicit in the Court's Order was that Fisher should not construe as permission to file an amended complaint, rather, she must file a motion requesting permission to amend and attach a copy of the proposed amended complaint.

Fisher timely complied with the Court's Order and filed her motion to amend with the attached proposed amended complaint two days later [Docket #79, Motion to amend, filed 15 Aug. 08]. Fisher's proposed amended complaint sought to add the exhausted retaliation claim and also state law claims for violations of Oklahoma's Public Policies.

Fisher communicates reason for the delay in motion to amend

Fisher explained she had only recently

learned of the availability of this remedy and argued state law claims were, in fact, an appropriate remedy. Thereafter numerous motions were filed by both parties concerning the motion to amend [Docket #85, Response in opposition to motion to amend, filed 2 Sep. 08; Docket #98, Reply to response in opposition, filed 16 Sep. 08; Docket #106, Opposed motion for leave to file surreply, filed 18Sep08; Docket #111, Motion for leave to file surreply, filed 22Sep08; Docket #112, Response in opposition, filed 3Sep08; Docket#113, Reply to response, filed 23Sep08; Docket #114, Surreply to motion, filed 23 Sep. 08; Docket #115, Opposed motion to stay, Filed 23 Sep. 08, Docket #120, Response in opposition, filed 29 Sep. 08].

District Court denies amendment to add state law claims

On 21 Oct. 08 the Court ruled on Fisher's opposed motion to amend [Docket # 133, Opinion and Order, filed 21 Oct. 08]. Fisher was permitted to add her exhausted retaliation claim, however, the Court denied the addition of state law claims and specified that any reference to such would be stricken.

Relevant to issue C

District Court proceedings and the Magistrates

During the course of the litigation in the District Court many motions were referred to and ruled upon by Magistrates. Fisher, a pro se litigant, was unaware of the distinction between a Magistrate and a District Court judge at the time. On two different occasions hearings were held. A third hearing was scheduled but later stricken after the Magistrate recused himself; the hearing was never rescheduled after transfer to a new Magistrate.

The first hearing was held before Magistrate Joyner and concerned motions to compel [Docket

#142, Transcript of proceedings, filed 30 Oct. 08]. Orders were entered denying the majority of the discovery Fisher sought and granting SWBT's motion for access to Fisher's physician and psychotherapy records [Docket #123, Order, filed 30 Sep. 08; Docket#138, Order, filed 29 Oct. 08].

Fisher objects to discovery of her medical/psychotherapist records

Fisher adamantly opposed SWBT's access to her medical records; specifically her psychotherapy records. The emotional distress claim was 'garden variety', and the ADA claim was a 'regarded as' claim.

Fisher stressed the irrelevance of her records, and also privilege as recognized by the Supreme Court of the United States. Fisher argued the privilege was not waived in the context of her claims.

Nonetheless, the Court granted SWBT access to what the Supreme Court has stated is "like spousal and attorney client privileges, the psychotherapy privilege is 'rooted in the imperative need for confidence and trust'," [*Jaffee v. Redmond*, No. 95-266, United States Supreme Court, 1996].

Court directs SWBT to submit affidavit

The second hearing was held before Magistrate Wilson, who subsequently recused himself from this matter. Fisher was seeking an Order to compel the discovery of documents withheld by SWBT under a privilege claim [Docket #181-2, Defendant's Privilege Log, filed 22 Dec. 08], Fisher did not contest the privilege nor of all of the documents, only those where an attorney was neither author recipient and merely cc'd on same.

Particularly, Fisher was seeking the 13 Nov. 06 e-mail where no attorney was listed concerning

this document; the e-mail was dated four days prior to Fisher's termination. SWBT argued work product, Fisher argued work product did not apply or alternatively, work product is waivable.

Magistrate Wilson directed counsel for SWBT to submit an affidavit by the attorney whom it was claimed ordered an investigation for EEOC purposes. Fisher also argued if the Court were inclined to rule against her, that she be given more time to submit further authorities and argument.

Fisher also sought additional discovery, disclosure and recusal of in-house counsel for SWBT, and that defendant's proposed expert report be stricken. Magistrate Wilson ruled at the hearing, contingent upon SWBT's submission of the aforementioned affidavit, that all documents on the privilege log were privileged. He likewise ruled against Fisher on her other discovery requests, with
the exception of one, without giving Fisher the additional requested time to submit further arguments and authorities. SWBT had eighteen days for their response to Fisher's motion to compel; Fisher, two days to reply.

Additional issues set for hearing, stricken, and never rescheduled

The remaining issues concerning in-house counsel for SWBT and their expert witness report were set for a hearing date that never materialized itself. When Magistrate Wilson's recused, the case was again transferred, this time to Magistrate McCarthy. Upon the motion of Fisher [Docket #226, Motion to clarify, filed Feb. 09], after SWBT had filed their motion for summary judgment, McCarthy ruled 'after reviewing the briefs, the affidavit sub-

mitted, and the recorded arguments held on 15 Jan. 09 before Magistrate Wilson [Docket #230, Opinion and
Order, filed 18 Feb. 09].

Fisher learns of rule concerning Magistrate objections and files motion for review

Although Fisher believed many of the Magistrate's rulings to be erroneous, she was unaware at that point in time that she could or should object. After SWBT's submitted their motion for summary judgment, and Magistrate McCarthy ruled, Fisher requested review of the Magistrate's Orders [Docket #271, Appeal of the Magistrate's Orders, filed 18 Mar. 09].

It was only through research and preparing for her response in opposition to summary judgment that Fisher discovered FRCP 72(a). Fisher immediately filed the motion for review which was decided within the same Order as summary judgment. The District Court judge affirmed all of the Magistrates Orders [Docket #296, Opinion and Order, filed 6 Apr. 09].

Relevant to issue D

The sealed summary judgment motion

SWBT filed their motion for summary judgment under seal [Docket #222, Sealed motion for summary judgment, filed 10 Feb. 09]. Prior to the filing, neither Fisher nor even the District Court were aware it would be filed under seal [Docket #225, Minute order, filed 11 Feb. 09].

On 27 Feb. 09 Fisher began a cross country move to Plymouth, Michigan arriving late evening 1 Mar. 09. Thereafter Fisher continued work on her response in opposition to summary judgment [Docket #255, Response in opposition, filed Mar. 09] while

simultaneously working on Magistrate McCarthy's Order of 18 Feb. 09 for her to provide bates numbers for SWBT.

Fisher had objected to this as the majority of these documents were produced by SWBT, notwithstanding the fact that the time it would take to go through the literally thousands of pages of documents would detract Fisher from work on her response in opposition to summary judgment. Moreover, during this same time period, Fisher was responding to SWBT's requests concerning pre-trial disclosures. Nonetheless Fisher began working to comply with the Court's Order.

Stress and error associated with summary judgment motion

Fisher filed her response in opposition to summary judgment on 9 Mar. 09, however, there were omissions and errors due to stress. Within forty-eight hours of filing her response, Fisher requested to supplement the same [Docket #262, Motion to file out of time, filed on 11 Mar. 09]. SWBT objected and, later the same day, the Court denied Fisher's request [Docket #265, Order, filed 11 Mar. 09].

Relevant to issue E

Oklahoma Supreme Court provides clarity to the bench and the bar

On 11 Feb. 09 Fisher filed a FRCP 60b motion premised upon the findings in *Kruchowski*, 2008 OK 105,202P.3d 144, and again, argued for the inclusion of State law claims [Docket #223,224; Motion to reconsider, filed 11 Feb. 09].

Throughout the course of litigation Fisher continually researched the area of employment law. It was through this research that Fisher discovered the newly decided *Kruchowski* case.

Through *Kruchowski*, the Oklahoma Supreme Court clarified the availability of a Burk Tort in employment discrimination claims for violations of Oklahoma's
Public Policy.

SWBT'S continued opposition

SWBT opposed Fisher's motion [Docket#235, Response in opposition, filed 27 Feb. 09] primarily arguing that Fisher had 'unduly delayed' in bringing her motion. SWBT even argued that *Kruchowski* was not applicable to this particular case when they were the very one previously requesting to stay the litigation pending the outcome of *Kruchowski*. As stated in their very own motion [Docket#115, Motion to stay, filed 23 Sep. 08] "The Oklahoma Supreme Court's decision In Weyerhauser ", (*Kruchowski v. Weyerhauser*), "will have a direct impact on whether Plaintiff can plead a Burk tort claim in this case".

Fisher did not get a disposition on the motion until the 6 Apr. 09 when the District Court denied it while contemporaneously granting summary judgment to SWBT [Docket #296, Opinion and Order, filed 6 Apr. 09].

Relevant to issue F

Summary judgment

SWBT filed a sealed motion for summary judgment on 10 Feb. 09 [Docket #222, Defendant's motion for summary judgment, filed 10 Feb. 09]. On 18 Feb. 09, per Court Order, SWBT filed a redacted version of the same [Docket #228, Redacted motion for summary judgment, filed 18 Feb. 09].

Fisher's opposition was filed on 9 Mar. 09 [Docket #255, Response in opposition to summary judgment, filed 9 Mar. 09]. The District Court entered summary judgment for SWBT on 6 Apr. 09.

SWBT had argued that Fisher could not establish a prima facie case of gender and disability discrimination. The Court found Fisher had established a prima facie case of gender discrimination but failed to show pretext.

The Court further found Fisher had established genuine issues of material fact as to whether SWBT regarded her as having psychological impairment, however, she had not shown that SWBT regarded her as substantially limited in a major life activity.

On the retaliation claims the Court found Fisher established a causal connection between her protected activity and negative employment actions, although the Court stated Fisher had failed to show pretext.

FRCP59e Motion

Fisher filed a motion to a alter order/judgment within ten days of the entry of summary judgment [Docket #306, Motion to alter Order/Judg. filed 20 Apr. 09]. Fisher argued the Court misapprehended the facts, her position, and the controlling law.

SWBT filed their response in opposition [Document #307, Response to motion, filed, 8 May 09] asserting that Fisher merely repeated already presented arguments and that the Court had properly ruled. Fisher's FRCP59e motion was denied by the District Court [Document #315, Opinion and Order, filed 1 Jun. 09], and this appeal follows.

SUMMARY OF THE ARGUMENTS

In the United States of America we are blessed to have a system of justice that provides for oversight and review. To err is human, this is not a novel fact. In the course of adjudicating the many decisions a District Court must make, combined with the pure

load of the dockets, errors are inevitable.

There are times when the errors are inconsequential to the outcome of the case based upon the merits, and this is viewed as 'harmless error'. Other times though, the errors are such that they interfere with the fair and efficient administration of Justice. This not only affects substantive rights, but also, if left uncorrected, can negatively impact the public's faith in our system of justice.

When the errors are prejudicial to a litigant and affect the outcome of a case, rather than the true merits, this is harmful error and must be reversed. During the course of litigation in the District Court, errors were made that affected Fisher's claims being tried on the merits.

The District Court erred in dismissing AT&T Inc.

AT&T Inc., formerly known as SBC Communications, may technically be viewed as a 'holding company' but that does not equate to 'free from liability', most certainly in the context of Fisher's claims.

Jurisdictional discovery is proper in this case, followed by the appropriate legal analysis; the integrated enterprises test, prior to determining whether or not dismissal is warranted.

Denial of amendments to complaint

Fisher sought to add amendments to the complaint, as Fisher expressed in a motion before the District Court. The reasoning was twofold; number one, she should be permitted to access all remedies that the law provides (as stated in her prayer of the complaint). Also, she, the public in general, and the Courts will continue to be burdened by litigation arising from the unlawful acts of the defendant(s)

until they are adequately held accountable and punished.

Clearly erroneous and contrary to law

The magistrate's Orders not only denied Fisher relevant discovery, but granted SWBT discovery on privileged psychotherapist records. In further discovery disputes, an evidentiary hearing that was scheduled was stricken due to the magistrate recusing himself. The hearing was never rescheduled. The matters were later decided 'upon the record', including the 'recorded arguments' held before the magistrate who recused himself.

The District Court did not apply the correct legal standard at summary judgment

In opposing summary judgment, Fisher presented enough evidence to raise genuine issues of material fact on all of her claims if the correct legal standard were applied. Fisher was under tremendous stress which interfered with her ability to present her motion in opposition in the most effective form, however, there exists enough evidence contained within the 'record as a whole' to preclude summary judgment.

This is a classic case where when the totality of the circumstances are viewed, pretext is glaring and abundant. The District Court granted summary judgment after determining there was no showing of pretext, again, applying the wrong legal standard for summary judgment.

ARGUMENT

AT&T incorrectly dismissed as a defendant to this action

The Standard of Review for a motion to dismiss for lack of personal jurisdiction is reviewed *de novo*, *Trierweiler v. Croxton Trench Holding Corp.*

90F.3d 1523, 1533; 10th Circuit-1996.

The District Court dismissed AT&T Inc. as a party to this action for lack of personal jurisdiction, and stated that Fisher had failed to address the alternative FRCP12b6 in her response [doc. #55, Opinion and Order, filed 20 May 09, fn2]. This ruling was made while simultaneously denying discovery on the issues [doc. #55, fn3]. Fisher did in fact address the FRCP12b6 motion specifically in her response, and requested discovery prior to a ruling on either ground [doc. #48, Response, filed 18 Apr. 09, pg. 1].

The Northern District of Oklahoma previously dismissed this same defendant in a case where the Tenth Circuit reversed and remanded [*Sanders v. Southwest-ern Bell Telephone, LP.*, No. 06-5199, 10th Cir. 2008]. The Tenth Circuit stated that the District Court had erroneously dismissed sua sponte; the defendant had not even moved for dismissal.

The United States Supreme Court has held that Due Process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts within it such that the maintenance of the suit does not offend the traditional notions of fair play and substantial justice, *Int'l Shoe v. Washington*, 326 U.S. 310 (1945).

AT&T Inc. argued that Fisher failed to establish the "minimum contacts" that the Due Process Clause of the Constitution requires in order to permit personal jurisdiction [doc#45, Motion to dismiss, filed 28 Mar. 09, pg. 7]. Reference is made to it's 'wholly owned' subsidiary Dobson Comm. Corp., an Oklahoma based company. AT&T Inc. attempted to confuse the issue in regards to Dobson..... it

was not until after their purchase of the Oklahoma based company that it became a subsidiary.

Fisher's reference to Dobson [doc. #48, Response, filed 18 Apr. 09, pg. 2] was in the context of the business transaction conducted through the purchase of Dobson prior to Dobson becoming a subsidiary. Fisher presented evidence of joint applications of SWBT and SBC Comm. Inc. (AT&T Inc.) to the FCC to conduct business within the state of Oklahoma [doc #49-3,4,5, Response, filed 21 Apr. 08].

The right to sue letter and notice of intent to reconsider from the EEOC [doc. #72-2, Motion for relief, filed 8 Aug. 08] shows copies were sent to Human Resources **AT&T Inc.**, at the then address for the corporate offices. It was AT&T Inc. who initially received the notification of Fisher filing an EEOC charge [doc. #197-3, exhibit, filed 9 Jan. 09]. As evidenced by the three attorney's who entered an appearance on behalf of AT&T Inc., they reasonably anticipate being hailed into Court in Oklahoma. Indeed the **local legal agent's** of AT&T are retained for the very purpose of defending suits within the forum.

SWBT's d/b/a AT&T is more than an achievement of increased market share through national name recognition, it is analogous to a *deceptive marketing practice*. Corporations were formed for the benefit of the public; it is in no way beneficial to the public to be deceived as to who is conducting business within their state. Just as AT&T Inc. profits from doing business within the state of Oklahoma, so too should they be held responsible for violations of Oklahoma's Public Policy.

Although AT&T claims it is not subject to personal jurisdiction, the Eastern District of Pennsylva-

nia found otherwise; Gammino, 2005WL 724130@*3. The Court held that SBC (same holding company that currently is known as AT&T Inc.), was amenable to jurisdiction in Penn. Primarily due to the content and interactivity of it's website. "SBC's internet contacts are for the purposeful availment of conducting business with Penn. residents. Such purposeful availment consequently subjects SBC to the general personal jurisdiction of this Court".

Fisher's burden of establishing that the District Court has personal jurisdiction was heightened by the denial of discovery. Further, although the District Court declined to address the issue of employer' for purposes of Title VII and the ADA by applying the appropriate legal analysis (integrated enterprise), the information to establish this was within the sole control of AT&T and SWBT. Given the tremendous resources of AT&T versus that of Fisher, the denial of discovery in this area was also prejudicial to Fisher.

The record in this case reveals that the meeting in which an employee is terminated is known and referred to by management as 'a day in Court'. This is just an example of their nauseous and arrogant disrespect for U.S. Codes and laws. It is time AT&T Inc. and their *'family of companies'* update their definition for a true day in Court.

The District Court erred in denying an amendment to include state law claims

The Standard of Review for denial of a motion to amend is reviewed for an abuse of discretion, *Horn v. Squire*, 81F.3d 969, 973; 10th Circuit-1996. Under Tenth Circuit precedent, a ruling based on *'an erroneous view of the law or on a clearly erroneous assessment of the evidence"* would constitute an

abuse of discretion, *Amocov. U.S. EPA,* No.99-1534; 10 Circuit 2000, *Jackson v. Iasis Healthcare Corp.*, N0.03-4050; 10th Circuit-2004 (finding an abuse of discretion for denial of leave to amend).

On 19 Jun. 08 Fisher requesting an extension of time in which to file a motion to reconsider [doc. #57, Motion to extend time]. Fisher was seeking reconsideration of a previous Order of the Court dismissing her retaliation claim [doc. #55, Order]. It was communicated by Fisher that there was confusion within the record with regards to the retaliation claim. Thereafter, the District Court appropriately denied the motion [doc. #58, Order, filed 19 Jun. 08].

On 8 Aug. 08 Fisher filed a FRCP 60b motion concerning the retaliation claim and submitted a Notice of intent to reconsider, and a new right to sue letter from the EEOC [doc. #72, 72-2, Motion for Relief & exhibits]. Additionally, on 13 Aug. 08 Fisher filed a motion to amend the scheduling Order **[doc. #76, Motion]**. It was specifically stated in Fisher's motion that the amendment she sought was for the purpose of including state law claims.

The Court responded the same day granting an extension of the scheduling Order to amend from 15 Jul. 08 to 15 Aug. 08, the Court also noted that Fisher had exhausted administrative remedies for the retaliation claim [doc. #78, Order]. On the 15 Aug. 08 Fisher filed her motion to amend which included the retaliation claim and addition of state law claims [doc. #79, Motion to amend].

The following two plus months consisted of extensive filings between both parties over the proposed amended complaint. SWBT asked the Court to 'stay' the case pending the outcome of the Tenth

Circuit's decision in *Carson v. Cudd Pressure Controls, Inc.*, No. 07-6199. Further, SWBT's motion to stay requested the stay pending certified questions to the Oklahoma Supreme Court regarding a Burk Tort; *Kruchowski, et. al. v. Weyerhaeuser Co,* C0,-104872. The motion to stay stated **"the Oklahoma Supreme Court's decision in Weyerhauser will have a direct impact on whether Plaintiff can plead a Burk tort claim in this case".**

The District Court issued it's Opinion and Order on 21 Oct. 08 [doc. #133, Order]. The Order specified Fisher could file an amended complaint, however, it was specified that "any reference to state law claims shall be stricken". The Court erroneously found that 'Saint applies to age discrimination claims only' [doc. #133, Order, 21 0ct. 08, pg. 16].

Further, The Civil Rights Act of 1964 Sec. 2000-e-7 [section 708] states that *'nothing in this subchapter shall be deemed to exempt or relieve any person from Liability, duty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter'.*

Moreover, the Court stated that "Plaintiff's second argument, the need for punitive damages to deter future discrimination, is inconsistent with Title VII's remedial scheme and does not support her request to amend" [doc. #133, Order, pg.8]. The case cited by the Court in support of this, *Albermarle Paper Co v. Moody*, 422 U.S. 405, 423 **(1975)**, was pre-

1991 amendments to the Act.

One of the very findings [see Civil Rights Act of **1991**, Sec. 2 [42 U.S.C. 1981 Note] of Congress declared that **additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace.** The District Court abused it's discretion by denying the amendment for the state law claims.

The Magistrate Orders were clearly erroneous and contrary to law

A District Court's affirmance of a Magistrate's Order is reviewed for an abuse of discretion. The discovery disputes in the litigation before the District Court were decided over a period of time by three different Magistrates. The initial Magistrate Order denied Fisher relevant discovery, and further disregarded U.S. Supreme Court precedent in the area of privilege of psychotherapy records [doc. #123, Order, 30 Sep. 08; doc. #138, Order 29 Oct. 08].

The first hearing was held before Magistrate Joyner on 30 Sep. 08. Fisher objected to SWBT's access to her psychotherapist records [doc. #142, transcript, pg. 66-74] and SWBT argued they needed the records to 'see if there were other stressors' in Fisher's life [doc. #142, transcript, pg. 64-66].

The Magistrate found that SWBT was entitled to the privileged records 'to see if you are telling the truth when you tell them you have suffered mental anguish and that you've had no other stressors' [doc. #142, transcript, pg. 65-66]. First as the transcript relays, Fisher never stated she didn't have other stressors in her life as the Magistrate said.

Fisher's argument was that there were other means to get their 'mitigating' information on damages and that she had yet to even be deposed and

questioned concerning this. Fisher also claimed the records were not necessary in defending a 'regarded as' claim under the ADA. SWBT argued necessity for determining if Fisher could perform the *essential functions* of her job. Fisher stated the defendant was currently in possession of the only potentially necessary medical records through their agent SMAART (the medical and accommodations resources team).

The U.S. Supreme Court in *Jaffee v. Redmond*, (95-266), 518 U.S. 1 (1966) made clear the privilege of psychotherapist records. 'Exceptions from the general rule disfavoring testimonial privileges may be justified, however, by a **"public good means transcending the normally predominant principle of utilizing all rational 34 R. App. 58 for ascertaining the truth"**, quoting *Trammell*, 445 U.S. @50, quoting *Elkins v. United States*, 364 U.S. 206, 234 (2960)(Frankfurter, J., dissenting),

'Guided by these principles, the question we address today is whether a privilege protecting confidential communications between a psychotherapist and her patients "promotes sufficiently important interests to outweigh the need for probative evidence..... "445 U.S., @51. **'Both "reason and experience" persuades us that it does".**

'Effective psychotherapy...depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosures of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede the development of the confidential re-

lationship necessary for successful treatment'. U.S. Surgeon General's Report on Mental Health; 1999. The report further addresses the *stigma's* and discrimination associated with seeking and receiving mental health treatment.

In the course of the proceeding before the Magistrate, it was 'assumed' that Fisher may not be telling the truth (justifying release of records to 'test the truthfullness' of Fisher) and it was shown that SWBT was not shooting straight [doc. #142, transcript, pg. 27-30; stating they had already produced a list of injuries that occurred both on the job and in training.....in direct contradiction to the **affidavit** previously submitted stating they don't keep records of injuries (doc. #118-12, exhibit affidavit of Ed Brady, filed 26 Sep. 08, pg.2)].

SWBT argued, in reference to Fisher's claim of privilege per U.S. Supreme Court case *Jaffe*, that the privilege had been waived [see doc. #142, transcript, Pg. 67-68], such is not the case. The only potential mention to a waiver of such by the Supreme Court is in fn19 wherein they mention the privilege giving way if a serious threat of harm to the patient or others can be averted only by means of a disclosure by the therapist. Further, the overall theme by the Court is that the protection of mental health records outweigh the need for probative evidence.

Fisher argued that relevancy was the key factor to consider in a motion to compel [doc. #90, Motion to compel, filed 8 Sep. 08, pg.3]. Despite her best efforts under the circumstances to gather relevant information to her claims, the Magistrate denied the discovery.

The second Magistrate on the case recused

himself after one hearing and prior to a previously scheduled evidentiary hearing on outstanding issues [doc. #218, Order, filed 2 Feb. 09]. Fisher, who had requested the hearing, was given short notice (two days) to prepare a reply on motion to compel (SWBT was given eighteen days to respond) .... [doc. #199, minute Order, filed 12 Jan. 09]. At the beginning of the hearing Fisher requested that if the Court were inclined to rule against her, that she be given additional time to submit more arguments and authorities.

Nonetheless, the Magistrate ruled without giving Fisher additional time and denying almost all the requested discovery. One of the things Fisher was seeking was the web ads for her previous supervisor on other employees. One of the ways to show disparate treatment is through records that establish an inconsistent pattern of requirements, scrutinization, and more write-ups than that of male employees under the same supervisor.

SWBT argued this was not relevant to the claims in the case. The U.S. Supreme Court in *Nat's RR Passenger Corp. v. Morgan*, No. 00-1614 (2002) said the use of background evidence may be used to support timely claims. Fisher sought e-mails withheld under the claim of privilege [doc. #181-2, exhibit, filed 22 Dec. 08]. Particularly Fisher was seeking the e-mail of 13 Nov. 06 where no attorney was author or recipient. SWBT claimed work product.

The magistrate, without SWBT submitting on their own, decided he would deny the motion to compel if SWBT could produce an affidavit by the attorney who directed the alleged investigation. SWBT later filed an affidavit [doc. #213, affidavit, filed 23 Jan. 09]. With respect to the remaining e-mails Fish-

er argued that an attorney merely cc'd on an e-mail did not justify the privilege. The Magistrate denied discovery on all of the e-mails.

Fisher also sought to strike SWBT's expert witness [doc. #185, Motion to strike, filed 23 Dec. 08], and to compel disclosure and recusal of SWBT attorney Mary C. Coulson [doc. #187, Motion to compel, filed 29 Dec. 09].

The Magistrate concluded there was no conflict of interest while misapprehending Fisher's position. Fisher's concern was that Coulson was oveRseeing the production of all discovery, and her husband was a named decision maker in the case. Indeed, Fisher had discovered a document that should have been produced per discovery requests and yet never was [doc. #205, response, filed 16 Jan. 09, footnote 2, doc. #205-5, exhibit].

The written agreement signed by Mr. Glenn Griffin, Associate Director of employee relations for SWBT was never fulfilled. At the time Fisher received her personnel file through discovery requests (after her termination, and the initiation of litigation) the unjust/unfair negative rating remained on her performance evaluation.

The third Magistrate after Magistrate Wilson recused, made his rulings based upon the record and the 'recorded arguments before Magistrate Wilson'. In effect, with all due respect to Magistrate McCarthy, he merely "rubber-stamped" Wilson's Order. Even though the District Court deemed Fisher's request for review as untimely, she nonetheless "independently reviewed" them.

The District Court abused it's discretion in affirming the Magistrate's Order's as neither clearly erroneous or contrary to law.

The District Court erred in denying leave to file a supplement in opposition to Summary Judgment

Within forty-eight hours of filing her response to summary judgment, Fisher requested leave to supplement, realizing the errors and omissions. Fisher maintained, and currently does, however, that the record as a whole precludes summary judgment.

The District Court concluded it would be prejudicial to the **defendant** to allow a twenty-four hour period to submit further information [doc. #265, Order, filed 11 Mar. 09]. It is not reasonable, under the circumstances of this case, that the leave Fisher requested would have been prejudicial to SWBT and unduly delayed the case. With four attorneys of record for SWBT, they made an 'error' and did not file their answer to the complaint on time [doc. #59, Motion for leave to file out of time, filed 19 Jun. 09]. The District Court granted their leave to file out of time. In a crucial area such as summary judgment, denying Fisher, an individual, twenty-four additional hours time was unreasonable and an abuse of discretion.

The District Court erred in denying Fisher's FRCP 60b motion

On 11 Feb. 09, premised upon her recent discovery of certified question of law to the Oklahoma Supreme Court in *Kruchowski*, Fisher filed a FRCP 60b motion concerning the prior denial of state law claims [doc. #223, Motion to reconsider]. The Oklahoma Supreme Court noted the confusion in this area and even tailored their verbage to state "in order to provide clarity to the bench and bar."

SWBT responded with reiterations of their prior arguments concerning the state law claims [doc. #235, Response, filed 27 Feb. 09]. SWBT continued to assert, even after the clarifications provided by the Oklahoma Supreme Court, that *Kruchowski* addressed only the availability of a Burk tort for age discrimination.

The *Kruchowski* case was an age discrimination case, however, the Oklahoma Supreme Court utilized their opportunity to clarify the parameters of a Burk tort in their answers. SWBT stated that the Court's denial of Fisher's motion to amend did not preclude her from pursuing gender and disability discrimination and retaliation claims in their entirety [doc. #235, Response, pg. 8-9] for she was continuing to pursue her federal claims.

In this same response [doc. #235, fn2], they reiterate the erroneous prior statements of the Court concerning Title VII and punitive damages. Again, Title VII was amended in 1991 to include punitive damages in order to **deter unlawful harassment and discrimination in the workplace**.

What SWBT is aware of is that Federal law places a cap on punitive damages, whereas state law does not. The maximum monetary damage for punitive damages under Federal law is $300.000, this would be but a slap on the hand for this huge corporation and would serve as no deterrent.

The District Court waited over five weeks to rule on Fisher's motion and then contemporaneously denied it while granting summary judgment to SWBT [doc. #296, Order, filed 6 Apr. 09]. The Court again stated that Fisher did not provide a sufficient explanation for the delay, which was less than two months and very shortly after Fisher learned of the

Oklahoma Supreme Court's answers while doing research.

The District Court did not appear to take into account that Fisher is not privy to new legal news as an attorney would be. The record itself shows that from the time of 16 Dec. 08 (the date the certified questions were answered), until the filing of Fisher's 60b motion on 11 Feb. 09, many motions were being filed by both parties. Fisher was diligent in filing the motion once she became aware of the decision.

The timing of the filing had absolutely nothing to do with the timing of summary judgment motion by SWBT, as the Court construed [doc. #296, Order, pg. 12-13]. The available remedies to a litigant should have no effect on whether there are genuine issues of material fact which is supposed to be the standard for summary judgment determinations. The District Court abused it's discretion in denying the FRCP60b relief.

The District Court erred in granting summary judgment and subsequently denying 59e relief

The standard of review for summary judgment is de novo. On 6 Apt. 09 the District Court granted summary judgment to SWBT on all of Fisher's claims [doc. #296, Order]. The Court found that Fisher had established a prima facie case on the gender discrimination and retaliation [doc. #296, Order, pg. 20, 32-33], but had not shown a genuine issue of material fact on pretext for each.

On the ADA claim, the Court found Fisher had established a genuine issue of material fact as to the defendant's regarding her as suffering from a psychological impairment [doc. #296, Order, pg. 26]. The Court further found that this did not preclude summary judgment because Fisher had not shown

SWBT regarded her as substantially limited in a major life activity.

In addressing the issue of pretext on both the gender and retaliation claims, the District Court misapprehended the controlling law. It is well settled that 'a plaintiff may not be forced to pursue any particular means of demonstrating pretext', *Patterson v. McLean Credit Union*, 491 U.S. 164, 187-88; (1989). 'The demonstration of pretext enables a plaintiff to survive summary judgment', *Randle v. City of Aurora*, 69 F.3d 441, 452; 10 Circuit-1989.

In *Reeves v. Sanderson Plumbing Co. Products*, 530 U.S. 133 (2000) the Court stated 'On a motion for summary judgment, the District Court is required to review the record "taken as a whole". Plaintiff's are not precluded from introducing "quite probative evidence of earlier acts of discrimination to support a claim of current discriminatory intent", even if prior events are beyond the limitations period. Evidence of pre-act discrimination is quite probative, *Bazemore v. Friday*, 478, U.S. 385, 402n.13 (1986).

The record taken as a whole in this case supports that Fisher made an internal EEO complaint in 2003 during a **four month unpaid suspension**. Immediately upon her return to work she was presented with the first negative employee evaluation of her career. Later, through a grievance resolve SWBT agreed to change the totally unsubstantiated, and retaliatory evaluation SWBT did not even keep their written agreement to do such; the evaluation was never altered.

Fisher experienced steady scrutinization from her internal EEO report through her termination. She was required to submit to random drug/alcohol

testing no less than thirteen times in a two year period (DOT regulations require that employees who have CDL licenses...such as those who drive bucket trucks are required to be randomly tested for drugs and alcohol.

Rather than follow the law on required testing [doc. #260-8, exhibit deposition of Mr. Charles Ciskowski, filed 10 Mar. 09, pg. 20-21] of male employees, SWBT singled out Fisher for testing without any reasonable cause. The standards for Fisher's yearly evaluations changed following the EEO report, and she was continuously 'documented' in web ads. 'Prior events not actionable may provide relevant circumstantial evidence to explain later, actionable events', *Noland v. McAdoo*, 39F.3d 269, 271-72; 10th Circuit-1994, *United States v. Diebold, Inc.* 369 U.S. 654, 655 82 S. Ct. 993, 994, 8LEd2d 176,1962 (finding where different inferences may be drawn from the evidence presented by the parties, the case is not one for summary judgment).

'If a plaintiff advances evidence establishing a prima facie case and evidence upon which a fact finder could conclude that the defendant's alleged non-discriminatory reasons for the employment decision are pretextual, the case should go to the factfinder', *Morgan v. Hilti, Inc.* 108F.3d 1319, 1323; 10th Circuit-1997. SWBT's proffered reason for Fisher's suspension and termination are not worthy of credence and a jury would not be required to believe it. Considering the un-disputed fact that Fisher had performed her job for nine years without climbing with gaffs, a jury could infer the sudden 'concern' for safety was merely a pre-text.

Given the fact that SWBT did not follow their own policy on safety retraining, and Fisher herself

was concerned for her safety, a jury could conclude a discriminatory and retaliatory motive on the part of SWBT [doc. #255, Response, filed 9 Mar. 09, paragraph 34]. The District Court failed to recognize the pretext Fisher did present.

In addressing the issue of regarded as substantially limited in a major life activity, the District Court, again, misapprehended Fisher's position, and the controlling law. The Court states that 'SWBT allowed plaintiff to return to work under it's Transitional Work Program, which suggests that SWBT viewed any restrictions on plaintiff's ability to work as temporary' [doc. #296, Order, pg. 26].

The Court failed to recognize that the six months they would not let Fisher return to work, after her doctor released her with restrictions. SWBT purported that because there was no definite date the restrictions would be lifted that they could not accommodate. In Feb. '06 when Fisher was attempting to return with restrictions, there was a one month time period given on the doctor's release [doc. #260-3, exhibit, filed 10 Mar. 09], however, SWBT refused to consider an accommodation against their own Transitional Work Program.

Fears, myths, and stereotypes are greatly associated with people 'regarded as' disabled. Fisher's area mgr. Mr. James contacted her disability case mgr. to inquire about her diagnosis [doc. #255-11, exhibit], he was informed that they were not at liberty to divulge that information. One of the greatest **fears** known to mankind is **fear of the unknown**. According to the EEOC's interpretive guide-lines, if an individual can show that the employer was motivated by myths, fears, and stereotypes-including regarding safety-the individual will satisfy concerns

the 'regarded as' component of the definition of disability within the meaning of the ADA.

The Tenth Circuit concluded in *Levelle v. Penske Logistics*, No. 05-1216; 2006, that because the employer's refusal to consider him for other jobs with his physical restrictions, a jury could conclude the employer viewed him as unable to perform a class of jobs or a broad range of jobs in various classes. In *Justice v. Crown Cork & Seal Co., Inc.* No. 07-80036; 10th Circuit-2008 this Court reversed summary judgment for the employer because there were genuine issues of material fact as to whether the employer regarded the employee as having a substantially limiting impairment.

The Tenth Circuit held in *McKenzie v. Dovala*, 2002, that an employee was 'regarded as' disabled had made out a prima facie case of discrimination based on her employer's alleged failure to reasonably accommodate her perceived disability. The District Court in this action misapprehended the facts; Fisher was arguing failure to accommodate as a means of establishing 'regarded as'. The District Court stated [doc. #296, Order, pg. 28] that "plaintiff's final argument in support of her ADA claim is that defendant failed to accommodate her **actual disability**, reasoning that it would not be reasonable to accommodate a perceived disability [doc. #296, Order, fnl0].

Fisher had previously attempted to reiterate this is a 'regarded as' claim and not an *actual disability*. In *Kelly v. Metallics West, Inc.*, No. 04-1051; 10th Circuit-2005 the Court held that an employee who was 'regarded as' disabled made out a prima facie case based upon her employer's alleged failure

to reasonably accommodate her perceived disability, quoting *Dovala*.

The District Court basically concluded that climbing with gaffs was an essential function of Fisher's job, It is not explained how she could perform the job for nine plus years, even exceeding expectations prior to the EEO report, without one time performing this essential function, *Skerski v. Time Warner*, 257F.3d 273 Third Circuit; 2001 (reversing summary judgment due to a genuine issue of material fact as to whether 'climbing' is an **essential function** as an installer technician.

Finally, the District Court did not apply a mixed motive analysis apparently on any of Fisher's claims, see *Costa v. Desert Palace*, No. 02-679 U.S. Supreme Court-2003; holding that direct evidence is not necessary for mixed motives.

Fisher filed a FRCP 59e motion requesting the Court to alter it's summary Judgment Order. The District Court denied this which was an abuse of discretion.

Fisher respectfully requests oral argument on these issues. It would materially assist the panel due to the fact that it provides for real time clarification of any issues, and further provides the opportunity for questions that may arise from review of the written record.

CONCLUSION

This case when viewed in it's entirety, presents a comedy of errors that are in no way humorous. Justice does not and should not depend upon which party has the deeper pocket, can wear down the other, or misrepresent the facts. Fisher has consistently sought to walk the proper path toward the road to Justice.

Genuine issues of material fact are present on all of the claims in this action, and as such, are required to be tried to a jury. Fisher respectfully requests a careful and thorough review on all of the issues, and prays it results in the reversal by this Court.

Respectfully submitted,
s/Tonia E. Fisher

Certificate of Compliance

Section 1. Word count

As required by Fed. R. App. P. 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 9519 words.

I relied on my word processor, Microsoft Office Word 2007, to obtain the count.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

By: s/Tonia E. Fisher

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that **APPELLANT'S OPENING BRIEF** has been scanned for viruses with Trend Micro AntiVirus, Version 16.10.2012, 2008, and, according to the program is free of viruses.

By: s/Tonia E. Fisher

CERTIFICATE OF SERVICE

I hereby certify that on 30 Aug. 09, I electronically transmitted the attached **APPELIANT'S OPENING BRIEF** to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants: Kim Love, Mary Loarke, Robin Funk, Mary Coulson James

No. 10-275

IN THE
Supreme Court of the United States

TONIA E. FISHER,
Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT

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December 13, 2010

QUESTIONS PRESENTED

1. Whether the courts below erred in granting respondent summary judgment where petitioner failed to present any evidence that respondent's asserted reason for discharging petitioner – namely, her refusal to take a work-safety training course integral to her job responsibilities – was a pretext for gender discrimination or retaliation under Title VII.

2. Whether the courts below erred in granting respondent summary judgment on petitioner's "perceived disability" discrimination claim under the ADA where petitioner failed to present any evidence that respondent viewed her as having a mental impairment that substantially limited a major life activity.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Southwestern Bell Telephone Company states the following:

Southwestern Bell Telephone Company, a Missouri corporation, is a wholly owned subsidiary of Southwestern Bell Texas Holdings, Inc., a Delaware corporation, which in turn is a wholly owned subsidiary of AT&T Inc., a publicly held Delaware corporation. AT&T Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

The petition should be denied because it seeks review of a fact-bound sufficiency-of-the-evidence determination affirmed in an unpublished opinion, and raises no issues of broader importance justifying this Court's review. Applying this Court's tripartite burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Dep't of Comm. Affairs v. Burdine*, 450 U.S. 248 (1981), the district court found, and the court of appeals affirmed, that the summary judgment record contained no evidence that Southwestern Bell Telephone Company's ("SWBT") asserted reason for terminating petitioner – her insubordinate refusal to attend a required work-safety training class – was a pretext for discrimination or retaliation. Petitioner does not even challenge the correctness of those evidentiary determinations. There is accordingly no reason for this Court to review the decision below because its conclusions are both factbound and undisputed.

Instead, petitioner seeks review of issues never properly pressed or passed on below: whether, in light of this Court's decision in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), a "mixed-motive" analysis should have applied to petitioner's Title VII and ADA claims. [Pet. i.] Those questions are waived. In the district court, petitioner always asserted a single-motive/pretext claim, never a mixed-motive claim, and she at all times agreed that the *McDonnell Douglas* framework applied. In a single line of her brief on appeal, petitioner asserted for the first time that her discrimination claims should be analyzed under the "mixed-motive" framework, but the court of appeals held the argument was waived and de-

clined to address it. In this Court, petitioner focuses solely on Title VII and makes no argument as to why the second question presented – the applicability of a mixed-motive analysis under the ADA – warrants this Court's review. Petitioner's questions presented thus are not properly before this Court.

Moreover, even if they had been preserved, petitioner's questions presented do not warrant this Court's review. *Desert Palace* held that direct evidence of discrimination is not required in a mixed-motive case. The Court nowhere suggested that it was altering its longstanding *McDonnell Douglas/Burdine* burden-shifting framework for single-motive/pretext cases. The cases cited by petitioner do not reflect any confusion or disagreement; they uniformly hold that the *McDonnell Douglas/Burdine* framework continues to govern traditional single-motive/pretext discrimination claims. Finally, prevailing on the questions presented would not help petitioner avoid summary judgment because there is no evidence whatsoever that discrimination and/or retaliation formed any part of the motive for her termination.

STATEMENT OF THE CASE

Factual Background[1]

Petitioner was employed by SWBT as a Customer Service Technician ("CST") in the Oklahoma Instal-

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[1] Much of the petition recites unproven allegations that have no bearing on the issues presented. This brief in opposition addresses only the facts and arguments relevant to consideration of the petition. SWBT's silence herein as to any extraneous allegations in the petition does not reflect agreement with those allegations or otherwise waive SWBT's right to contest those allegations in an appropriate forum.

lation and Repair ("I&R") Organization. In that capacity, she was responsible for repairing and installing residential and business telephone lines and equipment. According to the written job description and the testimony of SWBT officials, an essential job requirement for CSTs is the ability to climb non-step telephone poles using hooks. [Pet. App. 18a.] The CST inserts the hooks into the pole as each step is taken while ascending and descending the pole. The hooks allow the CST to access telephone wires, cables, attachments, and other equipment that may be positioned at different heights and locations on the pole. CSTs are required to pass several training courses, including a "Safe Pole Climbing" class, which trains employees how to safely to climb a non-step pole using hooks. Petitioner passed the Safe Pole Climbing class when she was first hired by SWBT.

In 2002, SWBT suspended petitioner for four months without pay because she failed to timely report that she had been charged with driving under the influence of alcohol while off the job. Petitioner was permitted to resume employment subject to random drug and alcohol testing. In the spring of 2003, Fisher filed an internal grievance alleging that her suspension was motivated by gender discrimination. She asserted that a male employee outside of the I&R organization was not disciplined in a similar fashion after he was arrested for driving under the influence. She also asserted that the drug-testing requirement was retaliation for her grievance. [Pet. App. 19a-20a.]

From August 2005 to August 2006, petitioner requested and received a non-job-related short-term disability leave. [Pet. App. 20a.] Upon her return,

she was initially assigned to light-duty work due to medical restrictions imposed by her doctor. [Pet App. 20a-21a.] Petitioner's doctor released her to return to her CST position in October 2006. [Pet. App. 21a.] Due to her extended time away from the job, and consistent with SWBT policy and practice, petitioner was advised that upon returning to her CST job duties she would be required to demonstrate that she could safely access a pole using hooks. In response, petitioner stated that she did not have any hooks and had not had hooks for several years. Based on petitioner's comments, and her lengthy absence from work, petitioner's area manager, Curtis James, told petitioner that she needed to report to a New Employee Safety Training ("NEST") class – a paid, instructor-led course that reviews how to safely climb a pole using hooks – scheduled to occur the following Monday, October 23, 2006. [Pet. App. 21a-22a.]

On Friday, October 20, 2006, the day after James told petitioner to attend the NEST class, petitioner called in sick. As a result, James called petitioner at home to inquire about her attendance at Monday's NEST safety training. During that conversation, petitioner told James she could not climb a pole using hooks. James told petitioner that if she could not attend the NEST safety training for medical reasons, she would need to provide a doctor's note. He also informed her that attendance at the NEST safety training was a condition of her continued employment with SWBT, and that her unexcused refusal to attend would be considered insubordination. [Pet. App. 23a.]

Petitioner did not report to NEST safety training. Nor did petitioner present a doctor's note or any other medical information that would have excused

her from participating in NEST safety training. Consequently, James recommended petitioner's discharge, and his supervisor, Charlie Ciskowski, authorized her termination for insubordination.

Proceedings Below

1. Petitioner filed suit in the United States District Court for the Northern District of Oklahoma on August 8, 2007, alleging that her termination by SWBT (1) was motivated by gender discrimination, as well as retaliation for her complaints of gender discrimination, in violation of Title VII; and (2) was motivated by James's and Ciskowski's mistaken belief that she suffered from a psychological impairment, in violation of the Americans with Disabilities Act ("ADA").[2]

After nearly one-and-a-half years of discovery, SWBT moved for summary judgment on February 10, 2009, on all of petitioner's claims. SWBT argued that petitioner had not made out a *prima facie* case of discrimination under the first step of the *McDonnell Douglas* burden-shifting framework. As to her ADA claim, SWBT also noted the absence of any record evidence that James or Ciskowski were aware that petitioner had any psychological impairment or other medical condition, much less a condition that impaired her ability to perform a major life activity. Indeed, petitioner had just been cleared to return to work by her physician. As to her Title VII claim, SWBT presented, among other things, unrefuted evidence that at least eight male technicians in the I&R organization also had been required to re-attend the NEST safety training class as a condition of contin-

[2] Petitioner also alleged a failure to accommodate claim under the ADA which is not at issue in this petition.

ued employment due to being away from the job for an extended period.[3]

SWBT also argued that, even if petitioner had established a *prima facie* case, she had adduced no evidence that SWBT's asserted motive for terminating her – namely, insubordination stemming from her refusal to attend the mandatory NEST safety training session – was a pretext for discrimination or retaliation under the third step of *McDonnell Douglas*. Petitioner admitted that she had been told by James that she was required to attend the NEST safety training, and it was undisputed that similarly situated male CSTs were also required to attend such training.

In response to SWBT's summary judgment motion, petitioner did not dispute that the *McDonnell Douglas* framework applied to her Title VII and ADA claims. Rather, petitioner argued that summary judgment was unwarranted because she would "show . . . that the defendant's proffered reasons for the negative employment action were pretextual; the real reasons were discrimination and retaliation." [Respondent's Appendix A-14]

2. The district court granted SWBT summary judgment on all of petitioner's claims under the *McDonnell Douglas* framework that both parties agreed applied. With respect to petitioner's gender

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[3] Additionally, when James was a first-line manager, he had directed a male CST to re-attend NEST safety training as a condition of continued employment after he was away from the job for an extended period of time due to a temporary ankle injury. James himself had been required to re-attend a pole climbing class and demonstrate his ability to climb with hooks after he had been away from his CST job for an extended period of time for a non-medical reason. [Pet. App. 22a.]

discrimination claim, the district court assumed for purposes of the motion that petitioner had established a *prima facie* case, [Pet. App. 43a], and it found that petitioner had established a *prima facie* case of retaliation, [Pet. App. 58a-62a.] but it granted summary judgment for SWBT because petitioner had "not satisfied her burden to show that SWBT's reason for terminating her employment was pretextual." [Pet. App. 46a.]

The district court also found that petitioner had not established a *prima facie* case of disability discrimination because there was no evidence that SWBT "perceived her as substantially limited from performing a major life activity." To the contrary, "the evidence show[ed] that [SWBT] believed [petitioner] *could* perform the essential duties of her job," and merely wanted her to take a refresher training class before resuming those duties. [Pet. App. 53a (emphasis added).]

The district court denied petitioner's motion for reconsideration, which again embraced the *McDonnell Douglas* framework but challenged the court's factual findings that there was no genuine issue of material fact as to pretext and as to whether SWBT perceived her as disabled. [Pet. App. 71a, 74a-77a.]

3. The Tenth Circuit affirmed in an unpublished opinion. The court affirmed the district court's grant of summary judgment on petitioner's ADA claim, concluding that the record provided "no indication that SWBT perceived [petitioner] as disabled." [Pet. App. 9a.] As to petitioner's gender-discrimination and retaliation claims under Title VII, the court stated that the "sole question on appeal is whether [petitioner] submitted sufficient evidence of pretext" under the third step of *McDonnell Douglas*. [Pet.

App. 10a.] Concluding that petitioner had presented only "[u]nsupported conclusory allegations" of discrimination and retaliation, the court found that petitioner had failed to create a genuine issue of material fact. [Pet. App. 11a ("nothing in the record suggests that Ms. Fisher can establish pretext").]

In a single sentence on the last page of her brief on appeal, petitioner suggested for the first time that the district court should have analyzed her discrimination claims not under *McDonnell Douglas* but instead under a "mixed-motive" analysis.[4] The court of appeals refused to address her "newly asserted" and "inadequate" argument on that point. [Pet. App. 8a.] The court denied panel rehearing and rehearing *en banc*. [Pet. App. 14a-15a.]

REASONS FOR DENYING THE PETITION

The petition for certiorari should be denied. The decision below is fact-bound, raises no issue of general importance worthy of this Court's consideration, and is correct. Moreover, the questions that petitioner now seeks to raise are waived, do not implicate any split among the lower courts, and would not affect the outcome of the case.

I. THE DECISION BELOW IS FACT-BOUND, CORRECT, AND RAISES NO ISSUES WARRANTING THIS COURT'S REVIEW

Under this Court's *McDonnell Douglas/Burdine* burden-shifting framework, a plaintiff alleging that she was terminated "because of" unlawful considerations such as gender or disability must show that

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[4] Petitioner's appellate brief states: "Finally, the District Court did not apply a mixed motive analysis apparently on any of Fisher's claims, see Costa v. Desert Palace, No. 02-679 U.S. Supreme Court-2003; holding that direct evidence is not necessary for mixed motives." [Respondent's Appendix B-40].

those considerations were the "but for" cause of the employment action. The plaintiff first bears the burden of establishing a *prima facie* case of discrimination. The defendant then bears the burden of producing a legitimate, non-discriminatory reason for the employment decision. The burden of proof ultimately lies with the plaintiff to show that the asserted reason was pretextual. *See McDonnell Douglas*, 411 U.S. at 802-804. Applying this well-established analytical framework, the court below reviewed the summary judgment record, and concluded that petitioner had failed to raise a genuine issue of material fact as to whether SWBT's justification for terminating her was pretextual. That conclusion raises no issues of broader importance beyond this case, and thus does not warrant this Court's review.

Moreover, the correctness of the lower courts' conclusion is beyond dispute. The summary judgment record contains unrefuted testimony that petitioner's superiors terminated her because she refused to attend a safety-training class for one of her basic job duties – climbing telephone poles. As both courts below found, petitioner adduced no evidence to cast doubt on those reasons. Indeed, the petition does not contain any argument that there was a genuine dispute as to whether SWBT's justification for termination was pretextual. Nor does it point to any record evidence demonstrating pretext. This Court's review is unwarranted because the conclusion of the court below is fact-bound, correct, and undisputed.

II. PETITIONER'S QUESTIONS PRESENTED ARE NOT PROPERLY RAISED AND DO NOT WARRANT REVIEW

A. Petitioner's Questions Presented Are Waived

Petitioner asks this Court to review whether a "mixed-motive" standard should apply to petitioner's Title VII and ADA claims. As this Court explained in *Desert Palace*, 539 U.S. at 94-95, Congress amended Title VII in the Civil Rights Act of 1991 to authorize discrimination claims in which an improper consideration was "a motivating factor" for an adverse employment decision. *See* 42 U.S.C. § 2000e-2(m) (providing that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice"). Congress did not enact a similar mixed-motive provision in the ADA. *See Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 962 (7th Cir. 2010).

Here, petitioner never asserted a mixed-motive claim in the district court and always agreed that analysis of her claims under *McDonnell Douglas* was appropriate. A plaintiff must give reasonable notice that she is pursuing a mixed-motive claim. Petitioner's failure to do so constituted a forfeiture of her right to pursue such a claim. *See Hashem-Younes v. Danou Enters. Inc.*, 311 Fed. App'x 777, 779 (6th Cir. 2009) (affirming the district court's application of the *McDonnell Douglas/Burdine* framework where the plaintiff failed to raise a mixed-motive claim in her complaint or in her response to the defendants' summary judgment motion). Petitioner also failed to raise the questions presented properly on appeal.

Petitioner's one-sentence invocation of the mixed-motive framework in her brief on appeal was rejected by the Tenth Circuit as a "newly asserted" and "inadequate" argument. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836 (10th Cir. 2005) (issues inadequately briefed are waived). Petitioner's questions presented thus are not properly raised for this Court's review. *See, e.g., Davis v. U.S.*, 495 U.S. 472, 489 (1990) (Court will not consider arguments inadequately preserved below); *Auer v. Robbins*, 519 U.S. 452, 464 (1997) (same) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)).

In this Court, moreover, petitioner fails to explain anywhere in the petition the reasons this Court should grant certiorari on her second question presented – namely, whether the "mixed-motive" standard applies to her ADA claims. The petition focuses solely on Title VII standards. It contains no discussion of why a "mixed-motive" analysis is appropriate under the ADA despite the absence of statutory language authorizing it. *See Gross v. FBL Financial Servs., Inc.*, 129 S.Ct. 2343, 2350 (2009) (holding that the ADEA did not authorize a "mixed-motives" discrimination claim because Congress did not amend the ADEA as it did Title VII); *Serwatka*, 591 F.3d at 962-63 (holding, based on *Gross*, that the ADA likewise does not authorize a mixed-motives discrimination claim). And it fails to show that the issue is important or a subject of conflict among the circuit courts. The second question presented thus is not properly presented to this Court for this additional reason.

B. Petitioner's Questions Presented Do Not Warrant This Court's Review

1. Even if petitioner's questions presented were properly before this Court, which they are not, they would not warrant this Court's review. Contrary to petitioner's assertion, there is no circuit split or "confusion" about whether a "mixed-motive" standard applies to single-motive/pretext Title VII claims after this Court's decision in *Desert Palace*. *Desert Palace* held that "direct evidence of discrimination is not required in mixed-motive cases." 539 U.S. at 101. The Court's decision was expressly limited to mixed-motive claims, *see id.* at 91 n.1, and it did not mention, much less purport to modify, the *McDonnell Douglas/Burdine* framework. Indeed, even after *Desert Palace*, this Court has continued to apply the *McDonnell Douglas/Burdine* analysis to summary judgment challenges in single-motive/pretext Title VII cases. *See Raytheon Co. v. Hernandez*, 540 U.S. 44, 53-55 (2003); *see also Johnson v. California*, 545 U.S. 162, 171 n.7 (2005) (citing the *McDonnell Douglas* framework with approval).

In contending that *Desert Palace* caused "confusion" about whether the mixed-motive analysis should be applied at the summary judgment stage in all cases, including *single-motive/pretext* cases, petitioner simply mischaracterizes the case law. Petitioner asserts that *White v. Baxter*, 533 F.3d 381 (6th Cir. 2008), demonstrates a "raging split" in the circuits, but the quoted language describes disagreement about "how to analyze summary judgment challenges in Title VII *mixed-motives* cases." [Pet. 19 (emphasis added).] The court expressly held that "the *McDonnell Douglas/Burdine* framework continues to guide our summary judgment analysis of sin-

gle-motive discrimination claims brought pursuant only to Title VII's general anti-discrimination provision." *Id.* at 400 n.10.

Likewise, the Fifth Circuit's decision in *Smith v. Xerox Corp.*, 602 F.3d 320 (5th Cir. 2010), was a mixed-motive case and did not address the standards applicable to single-motive/pretext cases. Indeed, the Fifth Circuit had previously recognized that "*Desert Palace* had no effect on pretext cases under *McDonnell Douglas*" and that its adoption of a "modified *McDonnell Douglas*" standard applies only to mixed-motive cases. *Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 340-341 (5th Cir. 2005). *Smith* did not purport to abrogate that prior precedent.

None of the other cases relied on by petitioner remotely suggests that a mixed-motive standard should apply to a single-motive/pretext claim. The First Circuit's decision in *Collazo v. Bristol Meyers Squibb Mfg., Inc.*, 617 F.3d 39 (1st Cir. 2010), straightforwardly applied the *McDonnell Douglas* framework on summary judgment. The language quoted by petitioner merely recites the cardinal summary-judgment standard that the non-moving party need not prove its case, and must only raise evidence sufficient to create a genuine issue of material fact.

The Second Circuit's decision in *Fields v. New York State Office of Mental Retardation and Developmental Disabilities*, 115 F.3d 116 (2d Cir. 1997), expressly reaffirmed the "distinction that underlies all Title VII cases," namely, "the distinction between single motive and dual (or multiple) motive cases." *Id.* at 119. The language quoted by petitioner merely confirms that, when a plaintiff pursues a mixed-motive case, he need not prove "*both* that the defen-

dant's proffered nondiscriminatory reason was pretextual and that a discriminatory reason motivated the employer's adverse action." *Id.* at 120.

Likewise, by petitioner's own description, the Fourth Circuit and Eighth Circuit recognize that single-motive and mixed-motive claims are "alternative" theories. [Pet. 20-22.] Indeed, the Fourth Circuit in *Diamond v. Colonial Life & Accident Insurance Co.*, 416 F.3d 310 (4th Cir. 2005), expressly rejected the plaintiff's contention that *Desert Palace* abrogated the use of the *McDonnell Douglas* framework, stating that such an argument "finds no support in the text of *Desert Palace*, which does not even mention *McDonnell Douglas*." *Id.* at 319 n.5.

Petitioner also incorrectly asserts that the Tenth Circuit has not addressed the "impact of *Desert Palace* at the summary judgment phase." [Pet. 23 (italics added).] To the contrary, in *Fye v. Oklahoma Corp. Comm.*, 516 F.3d 1217 (10th Cir. 2008), the Tenth Circuit recognized *Desert Palace*'s holding that a "plaintiff may use both direct and circumstantial evidence to establish a mixed-motive case." *Id.* at 1226 n.1. The court also reaffirmed the *McDonnell Douglas* burden-shifting framework as an alternative framework without suggesting that it was affected by *Desert Palace*'s holding. *Id.* at 1227-28.

In sum, there is no circuit split as to whether a "mixed-motive" analysis should apply on summary judgment to single-motive/pretext discrimination claims.[5] The cases relied on by petitioner confirm

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[5] *See also Cooper v. Southern Co.*, 390 F.3d 695, 725 n.17 (11th Cir. 2004), *overruled on other grounds* (holding *Desert Palace* had no impact on Title VII non-mixed motive cases, and the *McDonnell Douglas* framework continues to apply at summary judgment to single-motive/pretext cases); *Makky v. Certoff*, 541

that the two are alternative theories. The courts below did not apply a mixed-motive analysis for the simple reason that petitioner never claimed to be pursuing a mixed-motive case.

2. This Court's review also is unwarranted because SWBT would have been entitled to summary judgment even if petitioner had pursued a mixed-motive case. To avoid summary judgment, the record evidence would have had to allow a reasonable jury to find by a preponderance of the evidence that gender discrimination or retaliation were "motivating factors" in SWBT's termination decision. *See Desert Palace*, 539 U.S. at 101; *Fye*, 516 F.3d at 1225. Here, the district concluded that petitioner's "allegations of gender discrimination [were] not supported by any evidence, and instead, her vague allegations of gender discrimination [were] directly contradicted by the evidence in the summary judgment record." [Pet. App. 45a.] Likewise, the district court found that petitioner had failed to establish even a *prima facie* case of disability discrimination. [Pet. App. 54a.] The court of appeals affirmed the district court's conclusions regarding discrimination and retaliation, [Pet. App. 9a-11a], and the petition offers no evidence

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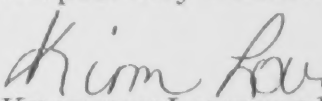
F.3d 205 (3rd Cir. 2008) (recognizing that *McDonnell Douglas* continues to apply to a single-motive/pretext case); *Pheng Vuong v. New York Life Insurance Co.*, 360 Fed.Appx. 218 (2nd Cir. 2010) (recognizing that the court applies either the *McDonnell Douglas* framework or the mixed-motive analysis to Title VII cases on summary judgment depending on the evidence presented); *Sallis v. University of Minnesota*, 408 F.3d 470, 475 and n.4 (8th Cir. 2005) (holding that Title VII cases are analyzed under *McDonnell Douglas* if the plaintiff presents a case of pretext and the *Desert Palace* mixed-motive analysis if the plaintiff presents a mixed-motive case), *Hawn v. Executive Jet Management, Inc.*, 615 F.3d 1151 (9th Cir. 2010) (applying *McDonnell Douglas* framework to Tile VII discrimination case.

to undermine them. Because the record contains no evidence that gender or disability discrimination or retaliation were even part of the reason for petitioner's termination, the decision below was correct under a "mixed-motive" framework.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,



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December 13, 2010

NO. 10-275

In The

Supreme Court Of The United States

Tonia E. Fisher

vs.

Southwestern Bell Telephone Company

Petition for a Writ of Certiorari

to the United States Court of Appeals

for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

Tonia E. Fisher
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Plymouth, MI. 48170
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INTRODUCTION

The arguments submitted in response to the petition for certiorari are untenable. First, the response proposes that the questions presented have been waived. It is alleged that petitioner asserted *for the first time* in her brief on appeal the mixed motives analysis. This reply will show that the questions presented for review are indeed properly before this Court.

Second, the response does not deny that there is a wide circuit split over what the proper standard to evaluate claims at the summary judgment stage is. Instead, the response strategically states there is no circuit split on so called 'single motive' cases, and then proceeds to label petitioner's case as such. The questions, as presented by petitioner, are reformulated by the respondent to divert attention from what are well known and documented dissentions within the Federal Courts of Appeals.

In an effort to diminish the importance of this continuing circuit split in relation to Title VII, the approach of the response is to differentiate a so called 'single motive' from 'mixed motives'. Simply put, this cannot be reconciled with the plain language of the governing statute[1].

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[1] 42USC2000e-2(a) It *shall* be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because

The response contends petitioner's case was a so called 'single motive' and that the McDonnell Douglas pretext analysis[2] was correctly utilized at the summary judgment stage to dismiss petitioner's claims. The question presented, as it relates to Title VII, and as articulated by petitioner--- is whether the mixed motives analysis is the correct legal standard at the summary judgment stage.

If an incorrect legal standard is used to evaluate the evidence, *as a matter of law*, the evidentiary determinations under that standard are flawed.

The question here is whether the petition should be granted. Whether there even exists a so called 'single motive' under Title VII, as amended, and the viability of the pretext analysis to demonstrate *a motivating factor* are encompassed within the questions petitioner presented to this Court. By arguing in support of the so called 'single motive'

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of such individual's race, color, religion, sex, or national origin. 42USC2000-2(m) Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was *a motivating factor* for *any* employment practice, even though other factors also motivated the practice.*****sec.2000e-2(a) is defining what an unlawful employment practice is. 2000e-2(m) is stating when that definition is established. The verbiage 'except as otherwise provided in this subchapter' is referring to disparate impact. 'Even though other factors also motivated the practice' is Congress' acknowledgment that employers will ***always*** allege a non-discriminatory reason for their action..

[2] The pretext analysis originated in *1973----before the 1991 amendments to Title VII*----as a framework for evaluating disparate treatment claims

pretext analysis, the response inadvertently reinforces the significance of the petitioner's questions presented.

Finally, the response argues that under either framework ----McDonnell Douglas or mixed motives----the decision below was correct. A review by this Court would not support that proposition. There is a substantial difference in the two analyses.

II. REASONS FOR GRANTING CERTIORARI

A. *The questions presented are properly before this Court.*

The Respondent alleges that the questions presented are not properly before this court, and that the mixed motives analysis was raised *for the first time* on appeal. Neither contention is correct. As the record reveals[3], the mixed motives analysis was raised initially in the District Court[4],[5].

The lower Court's passing on the issue in no way deprives this Court of jurisdiction to review the questions presented. As this Court has stated: "not

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[3] Supreme Court Rule 12(7): In any document filed with this Court, a party may cite or quote from the record, even if it has not been transmitted to this Court.

[4] See Doc.#313, Case 4:07-cv-00433-CVE-FHM, USDC ND/OK.
[5] See Instone Travel Tech Marine & Offshore v. Int'l Shipping Partners, 334F.3d 423, n.7; 5th Circuit; 2003 (stating issue raised for the first time in post judgment motions are preserved for appeal.), New York Life Insurance Co. v. Brown, 84F.3d 137, n.4; 5th Circuit, 1996 (same).

only may the Court address an issue that was passed on below, even if it was not pressed, but that there is a particular reason to do so when the issue is 'one of importance to the administration of Federal law'.".[6]

Further, even if the mixed motives analysis was not raised below -----which, as the record confirms, it was----- it is still properly before this Court. 'The traditional rule is that once a Federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments below.'[7].

Moreover, so called 'single motive' and 'mixed motives' are not claims, rather they are theories and/or arguments as they relate to the actual claims; violations of Title VII and the ADA. Accordingly, the questions presented are both preserved and appropriately before this Court.

B. ***The response in opposition only reinforces the need for this Court's review.***

The response attempts to dissuade this Court from granting the petition by alleging that 'petitioner always asserted a single-motive/pretext claim.'. There was never any stipulation agreed to concerning a so called 'single-motive' theory.

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[6] See Bankshares v. Sandberg 501 US 1083, n.8 ;1991 ("Respondents argue that this issue was not raised below....it suffices.....that the Court below passed on the issue".).

[7] See Yee v. Escondido, 503 US 519, 1992

Theories such as 'single motive' and 'mixed motives' are usually addressed by the Court and clarified at the pre-trial conference. In petitioner's case, summary judgment was granted just three days prior to the only pre-trial conference for the case. *Further,* petitioner's complaint[8] stated claims under Title *VII, as amended.* Notably, the 1991 amendments clarified the standard of causation to be *'a motivating factor'.*

In Price Waterhouse v. Hopkins, 490 US 228, 1989, the concept of mixed motives was first introduced. The plurality recognized that "to construe the words *'because of'* as colloquial shorthand for *'but-for causation',* as does Price Waterhouse, is to *misunderstand* them. This Court pointed out that "Congress specifically rejected an amendment that would have placed the word 'solely' in front of the words 'because of' "[9].

At oral argument in Desert Palace v. Costa, 539 US 90, 2003, there was much discussion concerning a so called 'single motive' and mixed motives[10]. As implicitly recognized during oral argument, once an employer alleges a non-discriminatory reason for the negative employment action, every case at that point in time becomes a mixed motives case. The Ninth Circuit En Banc decision in Costa v. Desert

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[8] See 4:07-cv-00433-CVE-FHM, USDC ND/OK, doc#136, filed 28Oct2008.

[9] Price Waterhouse v. Hopkins, 490 US 228, 1989, fn#7- referring to 110 Cong. Rec. 2728, 13837(1964).

[10] See transcript oral argument: Desert Palace, 539 US 90, 2003.

Palace, 299 F.838, 2003,·····which this Court *unanimously* affirmed·····recognized that so called 'single motive' and mixed motives are not two fundamentally different categories of cases.

Before Desert Palace a case was labeled according to the type of evidence presented. For cases presenting circumstantial evidence only, the Court's utilized the McDonnell Douglas/pretext analysis. The mixed motives analysis was limited to cases where direct evidence was presented.

Desert Palace held direct evidence was not necessary for a mixed motives instruction. The Court determined the plain language of the statute did not support a heightened evidentiary requirement. The same reasonable jury standard is required at summary judgment as is at trial. It would be absurd to demand a higher burden on the plaintiff at the summary judgment stage than what would be required at trial.

The holding in Desert Palace has effectively removed any distinction between labeling a case as 'single motive' or mixed motives. As evidenced by the response, however, this erroneous dichotomy is continuing even after Desert Palace. Countless individuals who are discriminated and/or retaliated against in the workplace are being denied their statutory rights.

Further, although the District Court did utilize the McDonnell Douglas framework [11] at summary judgment····· petitioner then disputed there were no genuine issues of material fact concerning pretext [12], and also asserted that under a mixed motive analysis there were genuine issues of material fact on all of the claims.

The response asserts that petitioner seeks review of 'whether, in light of this Court's decision in Desert Palace, Inc. v. Costa, 539U.S. 90(2003), a "mixed motives" analysis should have applied to petitioner's Title Vll and ADA claims.'.

The question presented for review in relation to Title Vll, as articulated by petitioner, asks whether "Under the plain language and ordinary meaning of Title Vll, *and after this Courts holding in Desert Palace*, the appropriate legal standard for analyzing claims brought under title Vll at the summary judgment stage is the mixed motives analysis.

This distinction is important because the plain language of the statute, after the 1991 amendments, specifically uses the terminology 'a motivating factor' as the standard of causation. Nothing within the governing statute supports the sole use of a pretext analysis. Petitioner's claims were erroneously dismissed at the summary judgment stage under a

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[11] Doc.#296, Case 4:07-cv-CVE_FHM

[12] Petitioner expressly states there are genuine issues of material fact as to pretext. The standard of causation under Title Vll, as amended, is 'a motivating factor'. A motivating factor may be demonstrated by, *but is not limited to*, pretext.

legal standard that cannot be justified after the 1991 amendments.

Additionally, the suggestion of the response that this Court continues to sanction the use of the pretext analysis under Title VII[13] is unavailing. Neither case cited questioned the propriety of that standard. Therefore, the cases cited as support for that proposition are of no consequence.

The question of so called 'single motive' theory, 'mixed motives' theory is instrumental to the questions presented[14] and ripe for this Court's determination. As amply illustrated by the response, employers are using the pretext analysis at the summary judgment stage to in an attempt to circumvent the statute(s). In a civilized society, when a statute is violated-----certainly one that affects an individual's very livelihood----- a sham to evade liability cannot trump the legislation enacted to provide for such.

C. *The lower Court erred in granting summary judgment.*

The response alleges that there is *no evidence whatsoever* that discrimination and/or retaliation formed any part of the motive for petitioner's

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[13] Response, p.9; citing to Raytheon Co. v. Hernandez, 540 US 44, 53-55, 2003, Johnson v. California, 545 US 162, 171 n. 7, 2005.

[14] Supreme Court Rule 14(1)(a): The statement of any question presented is deemed to comprise every subsidiary question fairly included therein.

termination. A separate appendix was filed with the response purporting to be petitioner's opposition to summary judgment[15][16]. However, the document submitted---A1-A36---is not an actual and complete duplicate of petitioner's response in opposition.

Although respondent's appendix does not show the document # or date filed, the actual record reflects the document to be #255, filed on 09Mar2009. Omitted from the appendix are fourteen exhibits attached to petitioner's opposition[17], and part of the true record filed. Additionally, doc. #260; 1-8, with eight exhibits, doc. #261, #262, are all part of the addenda to petitioner's opposition to summary judgment[18].

The alleged non discriminatory reason for petitioner's termination, insubordination for refusing to attend a safety course, defies sound reasoning and logic. Respondent's own documentation on petitioner's performance evaluations, *before* the first internal EEO complaint, describes petitioner as "*safety conscientious*" and "*makes good safety sense*". Likewise, it is a nonsensical proposition to maintain that climbing with gaffs was an essential function of petitioner's job or one of her basic job duties. The record reveals petitioner performed her job satisfactory for over

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[15] See A1-A36

[16] The typographical errors not indicative of the true record are assumed to be a result of the reformatting.

[17] Case 4:07-cv-00433-CVE-FHM, USDC ND/OK, doc#255:1-14 filed on 09Mar2009.

[18] Case 4:07-cv-00433-CVE-FHM, USDC ND/OK doc#260; filed on 10Mar2009, doc#261,#262, filed on 11Mar2009.

nine years without one time utilizing what respondent's term as an essential function[19], even exceeding expectations----again, *before* the EEO complaint. It is more than reasonable to ask what is wrong with this picture.

Although the response states that it is undisputed that similarly situated males were required to attend the training(response p.6), the record reveals otherwise[20] [21].

The Court below affirmed summary judgment under an erroneous legal standard. The response concedes as much while contemporaneously claiming the decision below was correct. The McDonnell Douglas framework, as described by respondents, requires a plaintiff to prove 'but for' causation(see response p.9). Nonetheless, the response states that "to avoid summary judgment, the record evidence would have had to allow a reasonable jury to find by a preponderance of the evidence that gender discrimination or retaliation were ***'a motivating factor'*** in SWBT's termination decision."(see response p. 15). Put simply, the McDonnell Douglas

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[19] The response submits that an essential job function is the ability to climb non step telephone poles using hooks. The written job description states 'climbs step and nonstop poles to a working height of a min. of 18 feet ***and/or*** climbs ladders and works aloft with hand tools'. See Doc#228-1, P. 11, case 4:07-cv-00433-CVE-FHM, USDC ND/OK.

[20] See response A-21 #15, also, case 4:07-cv-00433-CVE-FHM, USDC ND/OK, doc. #260, exhibit 8.

[21] See case 4:07-cv-00433-CVE-FHM, doc#260, exhibit 5, filed 10Mar2009.

framework limits it's analysis solely to pretext[22]. This is far from the standard of causation the statute mandates: *a motivating factor.* This is a difference that makes a difference.

For example, under the pretext analysis a plaintiff is limited to disproving that the employers alleged reason is the true reason for the negative employment action. Even if the Court accepts the alleged non-discriminatory reason as true, the pretext analysis does not address whether there were other prohibited factors, ie: a protected characteristic, that also motivated the action.

It's been almost twenty years since Congress amended Title VII after finding that 'additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace', and 'legislation is necessary to provide additional protections against unlawful discrimination in employment'[23]. Over seven years ago this Court held in Desert Palace that no heightened evidentiary requirement was required under Title VII.

Still, the lower Courts are confused and continuing to apply an erroneous legal standard at the summary judgment stage under Title VII. As authorized by the United States Constitution, and in the interest of the fair and efficient administration of justice, this institution is in a position to bring about resolution. The sooner, the better.

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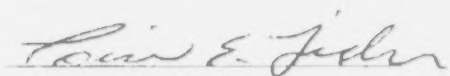
[22] See response p. 6-7 #3, appendix for petitioner, 9a-10a.
[23] Civil Rights Act of 1991, section 2(1)(3).

The United States Supreme Court continues to shine as a beacon of hope, to even the least among us, that individuals have a right to be heard. This case presents an outstanding opportunity for this Court to resolve important questions of Federal law, while ensuring equal justice under law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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